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IN THE

Supreme Court of the United States

October Term, 1972

No.....

[redacted] and
TED DEAN BUTLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Warren Burger and to the Honorable Associate Justices of the Supreme Court of the United States:

Come now [redacted] Ted Dean Butler and petition this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse judgments of conviction of the charges of conspiracy set forth in Count One and Count Five of the indictment, and upon which indictment two trials and two punishments were inflicted.

The case raises important questions of criminal law and procedure which require this Court's determination on issues of great gravity and general importance in the public interest and in order for this Court to exercise its supervisory power in criminal cases and to establish uniformity of decision

Non-disclosure of deal with informer: *Napue v. Illinois,* 360 U.S. 264, 3 L.ed.2d. 1217; *Giglio* v. U.S., 31 L.ed.2d 104; *Hoffa v. U.S.,* 385 U.S. 293, 17 L.ed. 2d 374; *Mesarosh v. U.S.,* 352 U.S. 1, 14, 1 L.ed.2d 1, 9; *McNabb v. U.S.,* 318 U.S. 332, 341, 87 L.ed. 819, 824.

Double jeopardy, where there are two trials before two different juries on the same indictment: *No. Carolina v. Pearce,* 395 U.S. 711, 23 L.ed.2d 656; *Patton v. No. Carolina,* 393 U.S. 922, 21 L.ed.2d 258; *Benton v. Maryland,* 395 U.S. 784, 23 L.ed. 2d 707; *Green v. U.S.,* 355 U.S. 184, 2 L.ed.2d 199; *In re Neilson,* 131 U.S. 176, 33 L.ed. 118.

Certification as to the effect of admitted and other errors on verdicts: *Chapman v. California,* 386 U.S. 18, 17 L.ed.2d 705.

Vagueness and uncertainty of statute: *Connelly v. General Construction Co.,* 269 U.S. 385, 391, 70 L.ed. 322, 328; *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 83 L.ed. 888; *Winters v. New York,* 333 U.S. 507, 92 L.ed. 840.

Lack of proof of defendants' participation in any

conspiracy; conviction violates due process where there is no evidence to support it: *Shuttlesworth v. Birmingham,* 382 U.S. 87, 15 L.ed.2d 176; *Thompson v. City of Louisville,* 362 U.S. 199, 4 L.ed.2d 654.

Your petitioners, Robert Butler and Ted Dean Butler, unrelated, were charged in a single indictment with two alleged conspiracies (Count One and Count Five of the indictment). Count One charged conspiracy to possess for sale and to sell dangerous drugs, to-wit, amphetamine tablets and barbiturate capsules, in violation of Title 21 U.S.C. Sec. 331(q), and in another count, to-wit, Count Five, conspiracy to conceal, transport and sell heroin, in violation of Title 21 U.S.C. Sec. 174, and Title 18 U.S.C. Sec. 371.

The same grand jury returned the single indictment of the two alleged conspiracies. A motion to sever Count One and Count Five was granted on the ground that to try them together would be prejudicial, but motions to hold that it was prejudicial to present the same evidence before the same Grand Jury for a single indictment were denied.

The Judge then proceeded to try the defendants before a jury on Count One of the indictment and proceeded to draw another jury over the objections of the defendants Butler, while the first jury was deliberating. He allowed the Butlers to plead once in Jeopardy, but denied their right to present evidence on the jeopardy plea or any relief by judgments of acquittal on

their pleas of once in jeopardy, including a motion to dismiss after the two juries had each returned verdicts of guilty o nthe same indictment and they had received double punishment on the same indictment. Robert Butler 2 years on count 1; 7 years on count 5; Ted Butler 2 years count 1; 15 years on count 5, concurrent.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S.C.

The opinion of the Court of Appeals was filed August 24, 1972. A petition for rehearing was duly filed with the Court of Appeals and supplemented by a letter to the Court pointing out certain and numerous errors in the opinion of the Court of Appeals. The letter was dated September 5, 1972. The Court, on February 7, 1973, denied the petition for rehearing but amended its opinion on the denial of the rehearing. It still failed to deal with or discuss the false representations made by the government counsel and by its principal witness, John Durden, and the violations of this Court's decision in *Napue v. Illinois,* 360 US 264, 3 L.ed.2d 1217, and *Giglio v. U.S.,* 31 L.ed.2d 104. It summarily rejected the pleas of once in jeopardy. It failed to certify that none of the errors asserted by the court or by appellants did not fatally infect the verdicts, as required by *Chapman v. California,* 386 U.S. 18, 17 L.ed. 705 (Appendix A-E)

An application for a further reconsideration on be-

half of the Butlers was summarily denied by the writer of the opinion, Judge Wallace, on February 22, 1973, and ordered lodged with the clerk.

This petition for writ of certiorari is being filed within 30 days of the denial of the rehearing of February 7, 1973.

OPINION BELOW

The opinion of the Court below is attached to this petition as Appendix "A", as are the amendments to the opinion, Appendices "B" and "C".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; Title 18 U.S.C. Sec. 371; Title 21, Secs. 173, 174, 331(q)(2)(3), 360(a)(b)(c); Title 28, Sec. 1652, and Title 47, Sec. 605, are involved herein.

THE FACTS

On September 9, 1969 John Durden was caught red-handed by federal narcotic agents to whom he was endeavoring to sell amphetamine tablets and barbiturate capsules which he had obtained from Joseph Damian Lovato and Joseph Leo Lovato. It was claimed by the government that he had 50,000 amphetamine tablets and 70,000 barbiturate capsules which he was

seeking to sell to a narcotic agent. (R.T. 662, 1114-15, 1118, 1210, 1333, 1724.)

Three days later, he again was arrested by federal agents, who raided his place of business and seized 45,000 barbiturates and 95,000 amphetamines. (R.T. 1127-1128, 1133.)

Durden had employed a young man named Ted Dean Butler as a handy man and maintenance man. Ted Dean Butler drove in another car over to the parking area while he (Durden) was making delivery or attempting to make a sale and delivery to the undercover narcotic agents. Ted Dean Butler was unaware of Durden's activities but was taken into custody nevertheless. Bail was posted by Durden for himself and for Butler, who was jointly indicted with Durden in U.S. District Court case No. 4847 (AAH)

Durden was also awaiting trials in the State courts of California for alleged theft of automobiles and stolen vehicles. (R.T. 797, 800-802, 945, 947.)

Robert Butler had a dress shop. He had sold clothes to Durden. There is no evidence that Robert Butler had in fact been in any illegal business. Durden had been a customer of his shop for teenage clothes.

After Durden was apprehended trying to sell pills to a federal agent, the officers at the same time also arrested Ted Dean Butler, who was employed by Durden as a maintenance man and was sitting in another automobile with a lady friend. Both Durden and Ted

Butler were taken to jail and booked at the same time. Both were thereafter arraigned on an indictment returned in the Courtroom of U.S. District Judge Hauk, indictment No. 4847. Both were represented by the same attorney until Durden entered into a deal with the government agents to work for them.

Durden sought his way out of this web of illegal entanglement. The narcotic agents had caught a big fly in its web and Durden was doing everything he could to get out of it.

Durden was working with Joseph Leo Lovato and Joe Damian Lovato, who were his sources of supply in Los Angeles. Joseph Leo Lovato was apprehended for this case at his home and appeared until time of trial. Joe Damian Lovato was apprehended and appeared in the early proceedings before the Commissioner but disappeared prior to trial.

A plea bargain or agreement for disposition of the case was entered into between Durden and his lawyers and the government attorney and government agents. Apparently one of the conditions of the bargain or deal was that there would be no revelation of its terms of conditions and that the government and its agents and Durden would vigorously deny that there was any deal. In this effort they were aided both in the trial Court and in another Court. Government counsel in the trial Court said he was in charge of the cases involving Durden and Ted Butler and in no way would the cases against Durden be dismissed. (R.T. 1938,

first trial.) The trial Court ruled that defendants' counsel could not argue to the jury that Durden's case would be dismissed. (R.T. 1968.) In fact,, the Court remarked, that if Durden's indictment were dismissed, the Court personally would "be very much surprised." (R.T. 1969.)

Efforts to find out the proceedings in the Court where Durden had been arraigned in *U.S. v. Durden*, No. 4762, 4847, were blocked. Efforts to get the stenographic notes or the contents thereof in the Court where Durden and Butler had been arraigned were fruitless. Whatever happened in that Courtroom were held either in camera or suppressed and made unavailable to the defendants. Efforts to learn what the deal was in exchange for Durden's testimony were fruitless. The deal was apparently made by Durden's attorney, who could not be found or reached, but the trial Court said that, in any event, his dealings and deals with Durden would be privileged as between "attorney and client."

For over a month Durden cogitated about what he should do while the narcotic agents were dealing with him to "cooperate" with the government and they would tell the Judge what he had done. In the meantime, arrrangements were made for him to be out on his own recognizance and to come to the office of the Narcotic Bureau and Dangerous Drugs Department and make phone calls which they would tape while they sat next to him and for the purpose of using these tapes, if possible, as evidence against the speakers on

the telephone. No permission or consent was received from the telephone company nor were any applications made to any court or Judge for a search warrant nor were the defendants advised that Durden was acting under the specific direction of the narcotic officers, who sat alongside of him with the tape recording going, nor were they advised of their constitutional right to an attorney and that anything they may say could be used against them. The telephone calls to Robert Butler were made directly to his home and constituted an illegal search of the privacy of his home; likewise the calls to his place of business. They were made by Durden with agents listening in. The constitutionality of the Dangerous Drug Act as being too vague and indefinite was attacked (Title 21 U.S.C. Sec. 331(q)(2)(3)).

At no time were any amphetamines or bariturates found or placed in the possession of either Robert Butler or Ted Dean Butler. At no time were either of the men seen or placed at the house of Joe Damian Lovato by any agents or any persons other than statements of Durden, for which he was to receive ultimately complete freedom from his admittedly nefarious activities. The narcotic agents, however, gave him (Durden) the opportunity to transfer his nefarious guilt to the shoulders of Robert Butler and Ted Dean Butler in order to escape himself from the just desserts of his activities.

Government counsel said he was in charge of the

cases involving Durden and in no way would the cases be dismissed. (R.T. 1938.) The Court ruled that counsel could not argue to the jury that Durden's case would be dismissed. (R.T. 1968.) In fact, the Court remarked to counsel that if the Durden indictment were dismissed the Court personally "would be very much surprised". (R.T. 1969.) Yet two months after the case had concluded, the indictment remaining in Judge Andrew Hauk's Court, which was the only indictment against Durden, was dismissed. (R.T. 1238, Judicial notice of District Court files in *U.S. v. Durden,* No. 4762, 4847.) (This is not denied by the government.)

Durden testified after he made his deal to cooperate that he agreed to work with Joe Lovato in the amphetamine and barbiturate business. (R.T. 599, 600, 898.) Allegedly he handled 1,830,000 tablets and capsules and distributed to eleven different customers, including federal agent Robert Sternaman. (R.T. 661, 1118.) He did not mention Robert Butler or Ted Dean Butler. (R.T. 655, 938; R.T. 896; R.T. 901; R.T. 938; R.T. 898; R.T. 897; R.T. 938.) (Robert Sternaman, R.T. 661, 1118; Victor, R.T. 899; Vince, R.T. 899.)

The government agents spent hundreds of hours in surveillance, (R.T. 1230) of which 40 to 50 was outside Leo Lovato's residence and other hours surveilling Robert Butler and Ted Dean Butler. Neither were seen at the Lovato residence by the agents nor with any dangreous drugs or narcotics.

THE GOVERNMENT'S DEAL WITH DURDEN

When federal agents arrested John Durden for the second time, they made a deal for his "cooperation" in drug investigations (R.T. 1133, 1236). After Durden replied he would "cooperate" it was through agent Sternaman's efforts that Durden was released from custody on his own recognizance (R.T. 1236, 1274-75).[1]

Six weeks later, on October 24, 1969, at the office of Durden's attorney, the agents met with Durden and counsel for a lengthy conversation about Durden's cooperation (R.T. 1236-37). To counsel's question about what the government would give in exchange for Durden's help, agent Sternaman said the government promised to bring the results of Durden's cooperation to the attention of the judge at the appropriate time (R.T. 1238). Sternaman claimed "that is the only promise we are ever allowed to make." (R.T. 1238).[2]

In addition to the recognizance release, agent Sternaman interceded for Durden in other ways (R.T. 1273). Durden had already been convicted in state court on two felony counts involving theft and forgery (R.T. 945). Prior to the sentencing hearing the state's chief district attorney on the case received a letter from the regional director of the federal narcotics bureau asking that Durden's "cooperation" be brought to the attention of the state court (R.T. 1276-77). Agent

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[1]Durden obtained release from custody after the earlier federal arrest by posting a $15,000 bond (R.T. 793).

[2]Sternaman testified that Durden heard him make the promise.

Sternaman acknowledged that he had written the letter for the director's signature and that he told Durden about the letter (R.T. 1277, 1283). The state court ordered that Durden be released on probation (R.T. 799).[3]

The two federal indictments[4] against Durden were consolidated into one indictment (R.T. 849) and on October 27, 1969, three days after the "cooperation" agreement was made with Durden and counsel, the government moved to continue the case and Durden was granted severance from his codefendants.[5]. Subsequently, after further continuances, the case was set for June 16, 1970, the day the instant case came to trial (R.T. 156; R.T. 852). Durden's case, which was "totally within (the) authority" (R.T. 1937) of the government prosecutor at bar, was set over until August and the government called Durden as its first witness before the jury impaneled below R.T. 559, 852).

As proceedings commenced the defense moved for exclusion of witnesses but the government requested the two agents in charge of the case be permitted to remain (R.T. 515-16). The court granted the exception and agents Sternaman and Clemente were thus

[3]With regard to the other state felony case against Durden the record indicates that as of June 1970 the matter was still pending; continuances had been granted for the past year and a half, including the nine months of Durden's cooperation (R.T. 853-54).

[4]C.D. Cal. nos. 4762 (10/1/69) & 4847 (10/15/69).

[5]*United States v. Durden*, C.D. Cal. no. 4847 (district court files) (the continuance and severance of October 27, 1969, are not apparent on the present record).

enabled to hear the testimony which their cooperation agreement with John Durden had engendered (R.T. 515-16, 795).

On direct examination the government elicited that Durden had "cooperated" in the investigation "because I had promised my wife I would." (R.T. 709).[6]

Cross-examined about the deal Durden denied that his recognizance release was due to his promising to cooperate (R.T. 793-94),[7] denied that the federal government had interceded in his behalf in the state court (R.T. 798-99), and denied that any promises had ever been made to him in regard to the pending federal charges (R.T. 796).[8] As the probe continued so did the Durden protestations: bail was waived not for the deal (cooperation) but because there was no risk of flight (R.T. 962); probation was not due to any letter but was granted because he was not guilty (R.T. 959); the federal agents "haven't promised me anything," (R.T. 893), and "[n]o consideration was ever given" to the to the federal charges (R.T. 960).

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[6]The court sustained the government's objection later in the proceedings to a defense request for identification of a woman in the courtroom alleged to be Durden's girl friend. (R.T. 1755-57).

[7]Attempts to learn the facts about Durden's bail release met with government objections (R.T. 794).

[8]The text of the exchange at page 796 is as follows:

"Q. Now, sir, have any promises ever been made to you in regard to these cases?"

A. No.

Q. How about your lawyer?

[Government counsel]: Objection, your Honor, it calls for hearsay.

[Defense counsel]: It goes to a state of mind, your Honor.

THE COURT: Were you present at any time when any promises—have any promises been made to you by anyone, as to any benefits that you were to receive from cooperating?

THE WITNESS: No."

On redirect, the government chose to build its case as follows:[9]

> "Q. Now, in regard to your testimony to the jury in this case, Mr. Durden, have you in any way been promised any help or aid from the Government or any member of the Government for this testimony?
>
> "A. No, I have not.
>
> "Q. Are you testifying to the whole truth, sir?
>
> "A. Yes, I am."

When the proceedings were approaching final argument it came to light that there had been a discussion at the most recent postponement of the government's case against Durden which suggested the possibility of a dismissal.[10] The prosecutor assured the court that he had total authority over the Durden case and urged against misconstruction of remarks made by Durden's attorney and an assistant government counsel who was merely filling in and had no knowledge of the case (R.T. 1937). The prosecutor concluded: "May I state for the record I do not intend

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[9]The colloquy occurs at R.T. 993.

[10]The attorney who had negotiated the October 24, 1969, "cooperation" agreement between Durden and the government allegedly said at bench on June 16, 1970, that he knew what was going to happen in Durden's case and indicated there would be no need to set a date for trial (R.T. 1936, 1987, 1990-91). Whether this would support an inference of a prior promise to dismiss the indictment as payment for Durden's cooperation was the subject of much dispute; the speculations about the terms of the cooperation agreement remained unsubstantiated since Durden's attorney was not amenable to service and since the attorney-client privilege would be an obstacle in any event (R.T. 1984-96). There are certain obscure references in the record to information possessed by attorney Wesley Russell about pretrial governmental statements that Durden would not be prosecuted (R.T. 1279-80).

to dismiss the case against John Durden." (R.T. 1938).

Noting the absence of evidence, (which had been suppressed) the court ruled against arguing to the jury that Durden's case would be dismissed (R.T. 1968-69). Indeed, if the Durden indictment were dismissed the court personally "would be very much surprised." (R.T. 1969).

In his testimony about the government's deal with Durden, agent Sternaman had declined to state with certainty that the narcotics bureau could have a case dismissed any time it so desired (R.T. 1278). The agent had acknowledged only the promise to bring the results of Durden's "cooperation" to the attention of the judge at an appropriate time (R.T. 1238). On June 29, 1970, the results of Durden's "cooperation" included six guilty verdicts and by August 17, 1970, the results emerged as a similar number of sentences (R.T. 355, 359, 440).[11] Whether September 29, 1970, was an appropriate time is unknown; the record contains no notation that on that day the district court granted the government's motion to dismiss the indictment in *United States v. Durden*.[12]

In the opening statement of the prosecutor in the second trial of the case, the prosecutor explained that

[11]Though the government had seized more than a quarter of a million dangerous drugs from John Durden's possession, it did not exhibit so much as an aspirin tablet found in the possession of any of the six persons who stand convicted (R.T. 1114-15, 1118, 1127-28, 1133).

[12]Notice may be taken of the court files in *United States v. Durden*, Nos. 4762, 4847 (C.D. Cal.).

"John Durden, the evidence will show, was involved with the Lovatos, involved in selling pills, dangerous drugs; not heroin, but pills. . . . Mr. Durden agreed to cooperate finally after about a month after he was arrested. He will testify that he did agree and the agents proposed to him that he make telephone calls to all the people that he thought were involved in this, and to try to arrange heroin sales to try to find out where the heroin was going." (R.T. 17-18).

The prosecutor also said: "Mr. Durden made phone calls to this Rosa, to the two Butlers here and also, of course, to the Lovatos. These telephone calls were tape recorded because the agents were standing right next to him with the tape recorders. (R.T. 18) * * * The evidence will show and Mr. Durden will testify that the agents told him to arrange heroin sales as I told you. *So you will see that Mr. Durden did arrange for three distributions of heroin from Lovato,* the first one around Thanksgiving, I believe November 27th. (R.T. 21) . . . When Leo meets Durden there there is another man with Mr. Durden." This was a federal agent, Joseph Gordon, who was in an undercover capacity pretending he was the ultimate buyer. Durden was pretending that he was getting *the heroin for this man,* Joseph Gordon, who was actually a federal agent.

"The second sale was in January, I believe January 13th. . . . You see the order then goes for Lovato to give Durden the heroin." (R.T. 22).

Durden is there again with Joseph Gordon, "pretending he is an ultimate purchaser of heroin, and Durden pretending he is getting the heroin for this ultimate purchaser Mr. Joseph Gordon. The final sale on February 6th, and this is the day of the arrest. The defendants were all arrested on February 6th." (R.T. 22).

The foregoing three government soliciated transactions, engineered with agent Joseph Gordon by John Durden, are the sole basis of the charges of "conspiracy" contained in Count Five against the defendants Robert Butler and Ted Dean Butler. All the telephone calls were prearranged with the narcotic agents and to be taped.

As the prosecutor told the second jury, the agents proposed to Durden "that he make telephone calls . . . and try to arrange heroin sales to try to find out where the heroin was going". (R.T. 17-18, second trial). "The evidence will show and Mr. Durden will testify that the agents told him to *arrange* heroin sales as I told you. So you will see that Mr. Durden did *arrange* for three distributions of heroin from Lovato. . . . Durden was pretending that he was getting the heroin for this man, Joseph Gordon, who was actually a federal agent." (R.T. 22, second trial).

All three alleged sales were made to Joseph Gordon, an undercover agent. None revealed any transaction with Butler, or either of them.

At the outset, an attack was made on the constitu-

tionality of Sections 331(q)(2) and (3) of Title 21, and Section 360 (a)(b) and (c) of Title 21 as being in violation of the Fifth Amendment to the Constitution of the United States, and that they were too vague, indefinite and uncertain to constitute a criminal offense. The Court overruled the objections to the statute. (R.T. 871, first trial).

On objections by the Butlers and other defendants that Count One and Count Five set up two conspiracies in the same indictment, Count One of which involved amphetamines and barbiturates and Count Five involved heroin, the Court severed Count Five from Count One, but the government did not proceed to a new indictment as to Count Five and the Court permitted the government to try the defendants on the same indictment before two juries. Defendants Ted Dean Butler and Robert Butler entered pleas of once in jeopardy at the outset of the second trial. After the trial started, Hilaria Aguilar was permitted to withdraw her plea to the indictment and an information was filed against her charging a tax count, to which she entered a plea of guilty.

The Court denied judgments of acquittal on Count One in the first trial and denied judgments of acquittal on Count Five in the second trial. He sentenced Ted Dean Butler (R.T. 884) to two years imprisonment on Count One and five years on Count Five, the sentences to run concurrently. Robert Butler was sentenced to the custody of the Attorney General for two years on

Count One and seven years on Count Five. (R.T. 887) the sentences to run concurrently.

After the evidence in the first trial ended, the trial Judge insisted on going ahead with the selection of another jury on the same indictment involving Count Five of the indictment, another conspiracy in which it was alleged that only heroin was involved. The defendants, and each of them, pleaded once in jeopardy and the Court then and later overruled the pleas and overruled the motions for judgments of acquittal, arrest of judgment and for new trial. (R.T. 870).

The Court also overruled attacks on the constitutionality of the statute as being too vague, indefinite and uncertain in Sections 331(q)(2) and (3) of Title 21 and Section 260 (a)(b) and (c) of Title 21 as being in violation of the Fifth Amendment to the Constitution of the United States. (R.T. 871).

The Court also read to the jury Title 21, Section 173 which was not charged. The Court denied objections to the lack of foundation for books that were introduced in the record and also denied the motions for acquittal and for new trial and in arrest of judgment. (R.T. 881).

When Joseph Lovato was arrested on February 6, the officers obtained a purported consent to search his garage. There was a footlocker in his garage which contained amphetamines and barbiturates and what appeared to be a ledger book, which was taken into cus-

tody. The ledger book and its writings were never identified as to who or how the notations were made in it or when and defense counsel was forbidden from cross-examining the officers with reference to this alleged consent or this search and seizure, which denied the defendants the right of confrontation of vital evidence against them.

Also, Robert Sternaman, one of the government agents, testified he searched through Joseph Leo Lovato's trash, which had been placed into the street in a closed, plastic bag container, for which he had no consent and which he claimed he found a phone number, which number was a telephone number of Bob Butler (Robert Butler). It was not shown, however, as to what telephone calls, if any, were made or for what purpose. Robert Butler had a teenage dress shop and the Lovatos had minor children.

At no time did the evidence show the actual presence of heroin in the possession of Robert Butler. At no time is it shown by the evidence that Butler ever was at the Lovato residence. At no time was it shown that any of the three alleged and manufactured sales of heroin went to or were destined to go to the Butlers.

Ted Dean Butler testified that he was 25 years old, married and had two children. (R.T. 752). He said he worked for Durden in a motel owned by Durden. His job was cleaning up, making the beds around the motel, vacuuming, washing walls, driving Durden's car. (R.T. 753). He said Durden was paying his rent,

(R.T. 754) and sent him on various errands. He said he had a call from Durden with reference to delivering a package to "Tommy". (R.T. 757). He was to take a package from Leo Lovato to Tommy. (R.T. 756-757) He said he did not know its contents. Tommy, he said, owned a hot dog stand. (R.T. 758). The package was about 2½ x 2½ or 3 x 3. It was in a plastic sandwich bag and the bag had a knot on the end of it. He could not see the contents because it had aluminum foil wrapped around it. Ted Butler was a handy boy employed by Durden.

"Q. Did you know what was in it?
"A. No, I didn't." (R.T. 758, second trial)

This was uncontradicted.

He said he received some money from Tommy. It was $500. Mr. Durden got it. R.T. 760). He said he did not receive anything. (R.T. 760) He said he received another package from Durden to take to Tommy and that was when he got the $500 which he turned over to Durden. (R.T. 761).

Asked if he had ever been convicted of a felony, he said when he was 19 years old he was implicated in an armed robbery and was later reduced to unarmed robbery and he received probation for it (R.T. 762).

The prosecutor was allowed to cross-examine Ted Butler over objection regarding matters not brought out on direct examination in connection with the book

found in Lovato's garage and also with reference to taped conversations not brought out on direct examination. The Court overruled objections from R.T. 769 to R.T. 775.

The Court overruled an objection to cross-examination regarding tape recordings. (R.T. 775-794).

The tests by the chemist showed a mixture of the substance with a dark brown, almost black, substance. The chemist only removed a small amount, the tip of a spatula. (R.T. 399). The percentage of heroin, according to him, was 74.1. The only thing he determined that was present was cocaine. (R.T. 401). The chemist did not know the formula of heroin. (R.T. 396-397) He said the material "contained heroin". The prosecutor kept insisting on asking whether the substance was heroin although the witness answered earlier that "The material contains heroin". (R.T. 395). The chemist made a composite from which he determined that 74 something percent heroin. (R.T. 403). He did not determine what percentage in each bag that he tested contained heroin. Neither of the two chemists knew the chemical formula for heroin.

The Court instructed the jury in the first trial that "amphetamine is a stimulant drug and that barbiturate is a depressant drug within the terms of Title 21 U.S.C., the portions of which I have read to you previously." (R.T. 2090).

This was without any testimony by any expert that

amphetamine is a stimulant drug and that barbiturate is a depresant drug within the terms of Title 21 U.S.C. Nor was there any evidence introduced to show that the Secretary had made a legal determination pursuant to the provisions of Section 360(a) that the drugs in evidence were stimulant or depressant within the meaning of the statute. Nor was there any evidence that these particular drugs are dangerous drugs.

This invaded the province of the jury to find whether the drugs were stimulant or depressant or dangerous. It was a fact determination required by the Seventh Amendment to the Constitution and one that the Judge was not to make, and his having done so was prejudicial error.

In the oral argument before the Court of Appeals, under questioning by Circuit Court Judge Walter Ely, government counsel admitted that he was thinking of having Durden plead to a misdemeanor, but that he had not disclosed this matter to defense counsel. He was closely questioned by Judge Ely on whether he did not think he had a duty to do so. The colloquy was not written up, although counsel for these appellants asked the Court to have it writtn up and made a part of the record. We renew this request. This was not done and the Court's opinion contains no comment or discussion about this, nor does the Court pass upon the suppression of the evidence and the command of the trial Court not to argue to the jury the promises made to Durden.

The Court also denied the pleas of once in jeopardy without permitting or taking any evidence.

The Court also failed to discuss the mass of telephone evidence taped by federal agents sitting next to Durden and invading the home and office of the appellants Butler.

The Court also erroneously permitted transcripts of the two-way conversation between the defendants and Durden, acting as a government agent, to be read and heard by the jury, part of which was not admitted in evidence as hearsay, but nevertheless read to the jury or listened to by them for the alleged purpose of making the other half of the conversation understandable.

QUESTIONS PRESENTED

1. Whether the suppression of the true facts with relation to the deal made by the government with Durden violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and deprived the defendants of their constitutional right of full cross-examination to attack Durden's credibility, and fair trial.

2. Whether the failure to disclose frankly all the details of the deal with Durden violated this Court's holding in *Napue v. Illinois*, 360 US 264, 3 L.ed.2d 1217, *Brady v. Maryland*, 373 US 83, 10 L.ed.2d 215, and *Giglio v. U.S.*, 31 L.ed.2d 104.

3. Whether two trials before two juries and two separate judgments and two sentences could be returned on one indictment without violating the Fifth Amendment provisions against double jeopardy.

4. Whether the issue of one conspiracy with several objects or multiple conspiracies should have been submitted to the jury.

5. Whether Title 21 U.S.C. Secs. 331(q)(2) and (3) are too vague and indefinite to constitute penal legislation and violate the Fifth Amendment to the Constitution of the United States.

6. Whether there is any proof of conspiracy by defendants as charged in Count One of the indictment.

7. Whether there is any conspiracy by defendants as charged in Count Five of the indictment.

7a. Whether solicitation by Durden at request of government agents created a "conspiracy" involving appellants and whether such conduct was against public policy. *Sherman v. U.S.* 356 U.S. 369 2 L.ed (2) 848; *Sorvalls v. U.S.* 287 U.S. 435, 453; *Vemstead v. U.S.* 277 U.S. 438, 470; *McNabb v. U.S.* 319 U.S. 332, 341.

8. Whether the government witness John Durden was making an illegal search for evidence in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and constructing a crime. *Wong Sun v. U.S.* 371 U.S. 471, 483, 486.

9. Whether the use of the telephone violated both

California law and federal law where the telephone was used without the consent of the telephone company or a magistrate and whether it violated the Fourth and Fifth Amendments to the Constitution of the United States.

10. Whether the interviews by Durden on behalf and direction of government agents of the defendants, or either of them, violated their rights under the Fifth Amendment against self-incrimination.

11. Whether a telephone number found by a federal agent in an unauthoribed search of a trash bag in front of Lovator's house, which handwriting was not identified nor the reason for the number being there, fatally infected the verdict in the light of the case of *People v. Krivda,* 5 Cal.3d 357 and 8 Cal.3d 623 and *Krivda v. California,* 34 L.ed. 2d 45.

12. Whether the government was required to get consent of the telephone company for its use of the telephone by Durden and whether such evidence was illegally secured in the light of *People v. Treiber,* 28 Cal.2d 657.

13. Whether the government agents were required to get the consent of a Court or Magistrate in order to make use of the telephone to invade the privacy of the Butlers and record the conversations.

14. Whether the telephonic conversations with Ted Butler violated the rule set down by this Court in *Massiah v. U.S.,* 377 US 201, 12 L.ed.2d 246. *Miranda v. Arizona* 384 U.S. 436, 457.

15. Whether the narrations on the telephone were an alleged search by Durden for evidence and merely narrations of past events or relationships and no proof of any conspiracy to violate any law.

16. Whether the alleged 4 conspiracies charged in the indictment are one conspiracy with many objects or two conspiracies. *Braverman v. U.S.* 317 U.S. 49; *U.S. v. Gilboy* 160 Fed. Sup. 442; *Ingram v. U.S.* 360 U.S. 672.

17. Whether the Butlers had standing to challenge and cross-examine federal agents regarding Lovatos and other dependents.

18. Whether judgments of acquital should have been granted.

REASONS FOR GRANTING THE WRIT

I

It is important for this Court to grant a hearing to determine the rights and duties of Courts to compel complete and truthful disclosures of deals that are made by the government for the testimony of witnesses and for the right to compel full disclosure of all the details so that no party who is affected is deprived of bringing out all of the facts before the jury. (*Napue v. Illinois,* 360 US 264, 3 L.ed.2d 1217; *Brady v. Maryland,* 373 US 83, 10 L.ed.2d 215; *Giglio v. U.S.,* 31 L.ed.2d 104).

The government is to be commended in keeping its

deal with Durden and dismissing the case two months after the trial concluded, *Santchello v. New York* 404 U.S. 257, 30 L.ed (2) 427, but they must be condemned and the case reversed because they permitted the true facts to be suppressed and the defendants falsely deprived of their rights to bring forth the credibility or lack of credibility of Durden in the trials.

Napue v. Illinois, 360 U.S. 264; *Giglio v. U.S.* 31 L.ed(2) 104.

By analogy in *Hoffa v. U.S.,* 385 US 293, 17 L.ed. 2d 374, Chief Justice Earl Warren said:

> "... Here, Edward Partin, ajailbird languishing in a Louisiana jail under indictments for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault), contacted federal authorities and told them he was willing to become, and would be useful, as an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apjarent—namely, his strong desire to work his way out of jail and out of his various legal entanglements with the State and Federal Governments. And it is interesting to note that, if this was his motive, he has been uniquely successful in satisfying it. In the four years since he first volunteered to be an informer against Hoffa he has not been prosecuted on any of the serious federal charges for which he was at that time jailed, and the state charges have apparently vanished into thin air.
>
> "Shortly after Partin made contact with the

federal authorities and told them of his position in the Baton Rouge Local of the Teamsters Union and of his acquaintance with Hoffa, his bail was suddenly reduced from $50,000 to $5,000 and he was released from jail. He immediately telephoned Hoffa, who was then in New Jersey, and, by collaborating with a state law enforcement official, surreptitiously made a tape recording of the conversation. A copy of the recording was furnished to federal authorities. Again on a pretext of wanting to talk with Huffa regarding Partin's legal difficulties, Partin telephoned Hoffa a few weeks later and succeeded in making a date to meet in Nashville where Hoffa and his attorneys were then preparing for the Test Fleet trial. Unknown to Hoffa, this call was also recorded and again federal authorities were informed as to the details.

* * *

"Everything Partin saw or heard was reported to federal authorities and much of it was ultimately the subject matter of his testimony in this case. For his services he was well paid by the Government, both through devious and secret support payments to his wife and, it may be inferred, by executed promises not to pursue the indictments under which he was charged at the time he became an informer.

"This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his

testimony. And that is exactly the quicksand upon which these convictions rest, because without Partin, who was the principal government witness, there would probably have been no convictions here. Thus, although petitioners make their main arguments on constitutional grounds and raise serious Fourth and Sixth Amendment questions, it should not even be necessary for the Court to reach those questions. For the affront to the quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers. As we said in ordering a new trial in *Mesarsh v. United States,* 352 U.S. 1, 14, 1 L.ed. 2d 1, 9, 77 S. Ct. 1 (1956), a federal case involving the testimony of an unsavory informer who, the Government admitted, had committed perjury in other cases:

"'This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

* * * * *

" 'The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.'

"See also *McNabb v. United States,* 318 U.S. 332, 341, 87 L. Ed. 819, 824, 63 S.Ct. 608 (1943).

* * *

"Here the Government reaches into the jailhouse to employ a man who was himself facing in-

dictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform. It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed. The Government in its zeal even assisted him in gaining a position from which he could be a witness to the confidential relationship of attorney and client engaged in the preparation of a criminal defense. And, for the dubious evidence thus obtained, the Government paid an enormous price. **Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guiltiy of obstructing justice. I cannot agree that what happened in this case is in keeping with the standards of justice in our federal system and I must, therefore, dissent."**

The analogy between Partin and Durden is clear, paraphrasing it "Because without Durden, who was the principal government witness, there would probably have been no convictions here. * * * The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

II

There is no authority that we can find for two trials before two juries with two punishments on the same indictment.

The trial of Count One on indictment No. 5902, we respectfully submit, exhausted the jurisdiction of the Court when it was placed before a jury.

The prosecutor may carve as large a morsel as the charge will permit, but he can carve but once. (*People v. Stephens, 79 Cal. 428; Ex parte Lange,* 18 Wall. 163, 21 L.ed. 872; *U.S. Benz,* 282 U.S. 304, 307, 75 L.ed. 354, 356, 357; *U.S. v. Sacco,* 367 F.2d 368; *U.S. v. Adams,* 362 F.2d 210; *Kennedy v. U.S.,* 330 F.2d 26; Fifth Amendment, U.S Constitution)

"The policy of the Bill of Rights is to make rare indeed the occasion when the citizen can for the same offense be required to run the gauntlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the government." (*Gori v. U.S.,* 367 U.S. 364, 372, 373, 6 L.ed.2d 901, 907; *North Carolina v. Pierce,* 395 U.S. 711; *Greene v. U.S.,* 355 U.S. 184, 2 L.ed. 2d 199)

Neither a prosecutor nor a court may amend or alter an indictment. (*Ex parte Bain,* 121 U.S. 1)

Once it has withdrawn part of the indictment from considreation by the jury, neither the court nor prosecutor can breathe life into another part of the indictment.

The court having determined that Count Five would be prejudicial to be tried together with Count One in effect held that the two alleged conspiracies were improperly joined in a single indictment. Jeopardy had

therefore attached, at least to the defendants with reference to Count Five in indictment No. 5902.

The court's ruling may also have the effect of nullifying Count One as having been returned by a grand jury which necessarily was prejudicially infected by the presentation of both the matters relating to Count One and Count Five in a single indictment.

III

The Court failed to instruct the jury on multiple conspiracies in connection with the indictment and was required to instruct the jury to decide whether there was more than one conspiracy.

The failure to instruct on multiple conspiracies was the decisional fulcrum of *U.S. v. Varelli,* 407 F.2d at 746-47. See: *U.S. v. Bless,* 422 F.2d 210, 213, n. 1; *Kotteakos v. U.S.,* 328 U.S. 769-70, 772; *U.S. v. Kelly,* 349 F.2d 720, 757; *U.S. v. Romano,* 421 F.2d 792, 801; *U.S. v. Soles,* 401 F. 2d 521, cert. den. sub nom. *Nelson v. U.S.,* 394 U.S. 931.

IV

The evidence is entirely insufficient to establish conspiracy.

There is not a scintilla of evidence that Robert Butler possessed for sale or possessed or sold amphetamine tablets and barbituate capsules or that he agreed to do so. Nor is there any evidence that these were

dangerous drugs or had been found to be such in accordance with the provisions of Section 360(a) of Title 21. Nor is there any evidence of possession of heroin except one instance of Butler as a delivery boy.

It was the duty of the jury under the Seventh Amendment to find the Court in instructing the jury invaded the province of the jury in telling the jury, when there was no evidence presented to it, "that amphetamine is a stimulant drug" or that "barbiturates is a depressant drug" within the meaning of the section. Nor did the Court instruct the jury in the language of the indictment itself, charging that these are "dangerous drugs," when there was no expert testimony or other testimony that the Secretary had made a determination as to the character of either amphetamine or barbiturate, or what percentage of the pills or capsules had to be actually the drug in question.

At this point we also attack the statute and the language of it as violative of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, requiring a statute to be so clear that a citizen may know by the simple reading of it whether he has violated the law. (*Connelly v. General Construction Co.*, 269 U.S. 385, 391, 70 L.ed. 322, 328)

The language of the statute is in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

See also: *Ashton v. Kentucky*, 384 U.S. 195, 200-201, 16 L.ed.2d 469; *Winters v. New York*, 333 U.S.

507, 92 L.ed. 840; *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 83 L.ed. 888; *Jordan v. DeGeorge,* 341 U.S. 223, 230, 95 L.ed. 886; *Watkins v. U.S.,* 354 U.S. 178, 208, 209, 1 L.ed.2d 1273, 1295, 1296; *Flaxer v. U.S.,* 358 U.S. 147, 151, 3 L.ed.2d 183, 186; *Raley v. Ohio,* 360 U.S. 423, 438, 439, 3 L.ed.2d 1344, 1356; *Brown v. Louisiana,* 383 U.S. 131, 15 L.ed.2d 637.

There is no proof of conspiracy of this sale titled "sales" by Durden to a narcotics agent.

In *Ong Way Jong v. U.S.,* 245 F.ed 392, the Court held: (1) That before one can be proven to be a conspirator and bound by admissions of a coconspirator, there must be some evidence produced of a conspiracy, and of his connection with the crime; (2) That "conspiracy" is a partnership in criminal purposes, and the gist of the crime is the confederation or combination of minds, and to infer guilt from mere association between conspirators does not meet the necessary test; and (3) That evidence was insufficient to sustain conviction of conspiracy to sell, conceal and transport narcotic drugs. The Court there said, at page 395:

> "This was all the competent evidence produced by the government against Ong. As is apparent, there is not a scintilla of evidence that Ong was guilty of conspiring to sell narcotics. He is not shown to have touched, possessed, sold or conspired to sell narcotics. The overt acts alleged in the indictment are entirely innocuous. Ong is not shown to have received, used, passed or touched any money used in the transaction of February 1."

Where the cooperation of two people is necessary to complete an act, which when consummated is a crime, such cooperation constitutes a substantive crime and may not be bent to conspiracy to commit that attempt. (*Gebardi v. U.S.*, 287 U.S. 112, 77 L.ed. 206; *U.S. v. Dietrich*, 126 F. 664; *U.S. v. Sager*, 49 F.2d 725; *Shannon v. Com.*, 14 Pa. 226; *State v. Law*, 189 Iowa 910, 179 NW 145; 2 Wharton, Crim. Law, 11th ed. Sec. 1602, p. 1746; *Corbett v. U.S.*, 229 F. 27)

In *U.S. v. Zeuli*, 137 F.2d 845, the Court held that if a crime necessarily involves mutual cooperation of two persons and they have in fact committed the crime, they have not been shown to have been in a conspiracy and to be convicted of a conspiracy to commit it. The Court said:

> "Lower federal courts have several times decided that, if a crime necesarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it. *United States v. Dietrich*, C.C., 126 F. 664 (Van Devanter and Munger, JJ.); *United States v. New York Central & H.R.R. Co.* C.C., 146 F. 298 (Hold. D.J.); *United States v. Sager*, 2 Cir., 49 F.2d 725, 727, 728. Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. *United States v. Katz*, 271 U.S. 354, 355, 46 S.Ct. 513, 70 L.Ed. 986; *Gebardi v. United States*, 287 U.S. 112, 122, 53 S.Ct. 35, 77 L.Ed. 206, 84 ALR 370.

V

Therefore, if the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of conspiracy. The indictment was not so confined; it laid a single conspiracy which comprehended not only the disposal of the books but the original theft of them. Such a conspiracy was not within the doctrine we have just mentioned, for it covered more than the crime of receiving. The difficulty was not therefore in the indictment but in the proof, for the prosecution did not connect Zeuli with the preliminary theft, or with the books at all until after they had been stolen, and at a time when nothing more remained to be done but to dispose of them."

See also: *U.S. v. Falcone,* 311 U.S. 205, 61 S.Ct. 204, 85 L.ed. 128.

Taking the opening statement of the prosecutor in the second trial as the facts it is apparent Durden's telephone calls to the appellants Butler was merely an exploratory search for evidence and violated the Fourth and Fifth Amendments to the Constitution of the United States. Neither had committed a crime nor "conspired to commit one." Durden was asked to solicit them to commit one.

Durden and the officer sitting next to him were the uninvited ear and oral statements overheard and

the fruits of their illegal overhearing are subject to suppression for violation of the Fourth Amendment rights. (*Alderman v. U.S.*, 394 U.S. 165, 171; *Silverman v. U.S.*, 365 U.S. 505, 5 L.ed.2d 734; *Katz v. U.S.*, 389 U.S. 347, 19 L.ed. 2d 576)

VI

This court should determine that state law controls the use of the telephone and whether before they are used by officers and their informers, permission must be secured from the telephone company and from the Courts of the state. (*People v. Treiber*, 28 Cal.2d 657)

VII

Durden's interrogations were really the interrogations of the officers and without the *Miranda* warning, they were illegally obtained in violation of the Fifth Amendment. (*Griffin v. California*, 380 U.S. 609, 14 L.ed.2d 106); *Miranda v. Arizona*, 386 U.S. 436, 457, et seq.; *Olson Steed v. U.S.*, 2774-5, 438, 485; *Malloy v. Hogan*, 378 U.S. 68; 12 L.ed.2d 653, 659.

What the officers were doing indirectly could not have been done by them directly. The inquiries were illegally; likewise the telephone calls to Ted Dean Butler after he was arrested and arraigned violated *Massiah v. U.S.*, 377 U.S. 201, 12 L.ed 2d 356.

VIII

In spying on Lovato's residence, federal agents ecured trash bags in front of Lovato''s house They secretly had the bags removed and examined the contents and extracted such evidence as they wished. They had no search warrant or other legal process. In one of the bags a slip of paper had the number of Robert Butler, which was his place of business, his dress shop. Nevertheless, the prosecutor made much of this number although no foundation was laid for the writing, its use in any way and such use was the fruit of the poisonous tree and infected the fairness of the verdict. Appellants were denied standing to cross-examine.

IX

The government experts tested a very small quantity of either the pills or barbiturates and later what was claimed in the second trial to be heroin. Neither expert was able to give the chemical formulae for amphetamines, for barbiturates or for heroin. The chemical formula is something every schoolboy learns in a chemistry course in school. The evidence failed to establish any foundation for establishing the alleged drugs charged to be violations.

On cross-examination the government's expert, James Look was asked:

> "Q. Mr. Look, what is the chemical formula for amphetamine sulfate?

"THE WITNESS: . . . No, I can't repeat it. (R.T. 1357)

"Q. Will you read the formula?

"A. No, I can't read the formula . . . (R.T. 1358) The nomenclature is very hard for me to remember the exact wording of it."

X

The telephone conversations, half of which were not part of what went to the jury (nor this court) although the Court permitted their contents to be placed before the jury, permitted the jury to considre hearsay evidence to reach its verdict.

XI

The Court invaded the province of the jury in his instruction as to whether the substances involved were a stimulant (emphetamines) or a depressant (barbiturates).

The Court had a duty to submit to the jury whether amphetamine is a stimulant drug and whether the quantity is such as to be a useable quantity and whether a barbituate involved in the case is a useable depressant drug within the meaning of the statute. The Court's instruction (R.T. 2090) took this factual determination away from the jury and thus invaded its province given to it by the Seventh Amendment. It is a matter of almost common knowledge that weight reducing remedies were based upon amphetamines and is de-

fined by Webster's Dictionary as a substance frequently used as a nasal spray. Barbiturates are described as a sedative. But whether the evidence in this case revealed a usable quantity of either of t h e m was not presented to or decided by the jury, nor was there any factual determination by the Secretary pursuant to the provisions of Section 360(a) that the drugs in evidence were stimulant or depressant within the meaning of the statute or whether there could be a conviction without such determination and without expert testimony presented to the jury.

Several errors appears in the court's opinion.

1. The court refers to John Durden as a "co-operating unindicted conspirator." The fact is that he was indicted on the same charge along with Ted Butler, but the indictment was returned in another courtroom, to-wit Judge Andrew Hauk's court for both defendants. Both were represented by counsel. Later another indictment was returned in the courtroom of Judge Crary,, charging the same drug acts and naming the petitioners herein along with John Durden as an unindicted co-conspirator in this trial. The other indictment remained pending and was continued from time to time until it was dismissed. The facts regarding the deal made to dismiss t h i s indictment before Judge Hawk were never fully or frankly disclosed in the other courtroom.

. . . . .

There is a sharp difference between a Partin in the

Hoffa case, who did not solicit Hoffa to engage in jury tampering, and the petitioners herein, regarding whom Durden was instructed to conduct an exploratory search for evidence and to engage in solicitation of distribution and sales of narcotics, as in this case. The Lewis and Lopez case are likewise distinguishable. Neither agent was conducting an exploratory search for evidence as in this case.

The statement in the opinion endeavoring to distinguish this case from Massiah and Escobido again mistakes the facts, stating "At the time of the recorded telephone calls, appellants were not indicted and were not represented by counsel as in Massiah" etc. Ted Butler had been indicted along with Durden shortly after their first arrest and at all times was represented by counsel, covering the same charge but filed in another court. Assume that the officers sitting alongside Durden when Durden telephoned and had asked them to come to their headquarter would anyone doubt that they would have been required to give the Miranda warning?

Because they spoke through the voice of Durden and through the telephone could they escape the duty of giving the Miranda a warning? Could they circumvent the mandates of Miranda, Massiah and Escobido by using a dummy to speak their words deceptively? The learned judge who wrote the opinion of the Court of Appeals finds that under the circumstances the right to counsel, so long upheld as a requirement of

due process, may be ignored and mutated, by the use of an informer, or the voice of someone who may not be identified, to deny a great constitutional right. See *Powell v. Alabama* 287 U.S. 45; *Gouled v. U.S.* 255 U.S. 298; *Sherman v. U.S.* 356 U.S. 369; *Silverman v. U.S.* 365 U.S. 505; *Black v. U.S.* 385 U.S. 385 U.S. 26; *U.S. v. Schipani* 362 F(2) 825.

The credibility of Durden, the informer, was highly important, as shown by the footnotes of the opinion, which rely on Durden's statements and telephone conversation. Yet the trial court would not allow argument to the jury that Durden was a liar, whose statements that he would receive a dismissal of all serious charges which existed against him, would be made in exchange for his testimony. Yet two months after the case concluded the charges against Durden were dismissed. Did not this prove beyond a shadow of of a doubt that there had been false and misleading statements to the defense and to the court and jury?

The Court of Appeals admits error in taking papers from the trash container by the officers and searching them. Among these papers was a slip containing a telephone number of Robert Butler. No cross examination by Butler's attorney was allowed. No certification was made by the Court of Appeals that this did not fatally infect the verdict (*Chapman v. California* 386 U.S. 18.)

Other errors were aserted by the Court of Appeals, but they held these harmless. Nevertheless they failed

to certify that these errors did not fatally affect the verdict beyond a reasonable doubt. (*Chapman v. California* 386 U.S. 18.)

We submit that many important constitutional and legal issues require the resolution of this Court in the fair administration of justice and in its supervisory capacity over the federal criminal courts and that a hearing should be granted and the judgments reversed.

WHEREFORE, appellants pray that this Honorable Court grant certiorari and reverse the judgments below as to each petitoner.

Respectfully submitted,

MORRIS LAVINE,
Attorney-at-law
215 West Seventh St., Suite 626
Los Angeles, Calif.
(Area 213) MAdison 7-3241

Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. CHARLES KING, Defendant-Appellant.	No. 71-1256
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MANUEL RODRIGUEZ, Defendant-Appellant.	No. 71-1088
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT BUTLER, Defendant-Appellant.	No. 71-1029
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. TED DEAN BUTLER, Defendant-Appellant.	No. 71-1030
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. VINCENT ARIAS, Defendant-Appellant.	No. 71-1031

Appeal From the United States District Court
For the Central District of California

Before: BARNES, ELY and WALLACE, Circuit Judges

WALLACE, Circuit Judge:

Appellants Robert Butler and Ted Dean Butler (unrelated) were charged both with conspiracy to possess for sale and to sell dangerous drugs (amphetamine tablets and barbiturate capsules) in violation of 21 U.S.C. § 331(q) and 18 U.S.C. § 371, and with conspiracy to conceal, transport and sell heroin, in violation of 21 U.S.C. § 174 and 18 U.S.C. § 371. Appellants Vincent Arias, Manuel Rodriguez and Charles King were charged only in the conspiracy to possess for sale and to sell dangerous drugs.

The trial court, after defense motions, severed the trial on the dangerous drug count from the trial on the count relating to heroin. The jury returned a guilty verdict as to each defendant at the conclusion of both trials. Appellants together charge sixty-two errors in this appeal.

TRIAL OF THE BUTLERS ON THE HEROIN COUNT

The Butlers allege error of constitutional dimensions based upon the introduction into evidence of various taped telephone conversations that took place between them and John Durden, a cooperating, unindicted co-conspirator.[1] With Durden's consent, the recordings were made by connecting his telephone with a tape recorder. There is no error. In *United States v. White,* 401 U.S. 745 (1971), the Supreme Court approved the testimony of government agents who

related warrantless electronically monitored conversations between the defendant and a consenting informat, and stated that the Fourth Amendment ". . . affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" 401 U.S. at 749. See also *Hoffa v. United States,* 385 U.S. 293 (1966); *Lewis v. United States,* 385 U.S. 206 (1966); *Lopez v. United States,* 373 U.S. 427, 438-39 (1963).

The Butlers further contend that their rights to counsel and to be free from self-incrimination were violated by the unseen and unheard monitoring of their conversations. They present the interesting argument that, since Durden was calling them at the request of government narcotics agents, they had a right to be warned of their right to counsel before they spoke, citing *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964). Appellents have failed to appreciate the rationale of the holdings in those cases. At the time of the recorded telephone calls, appellants had not been indicted and were not represented by counsel as in *Massiah;* nor are the facts of this case comparable with *Escobedo* where the investigation had reached the "accusatory" phase, the defendant had been arrested and his request for an attorney denied. In this case, appellants were clearly suspected of criminal activity and were being investigated. To grant a right to counsel under such circumstances, including a right to advice of such

a right, would be to mutate a constitutional right into a denial of the right of the public to have criminal activity thwarted. There is no right to counsel while one is committing a crime. *Grier v. United States,* 345 F.2d 523, 524 (9th Cir. 1965).

The Butlers also assert that the trial court committed reversible error by allowing the jury to hear tapes of and simultaneously read transcripts of Durden's half of the recorded conversations, contending that "a great mass of prejudicial hearsay" was thereby allowed into evidence. No particulars of the "great mass" were pointed out by counsel. While it is true that a few of Durden's statements contained narrative statements of events not strictly in furtherance of the conspiracy, none of those statements could reasonably be said to be so prejudicial as to constitute reversible error. The Court made a very meticulous effort to excise all such narratives which, in its judgment, could be construed to be irrelevant, and refused to allow the transcripts into evidence, thereby avoiding any potential reinforcement of Durden's half of the conversations. For the Judge to have excised all of Durden's half of the discussions would have rendered the recorded conversations, which were legitimate evidence, unintelligible.

Except as indicated later, we find the remainder of the arguments raised by the Butlers regarding the trial on the heroin count to be devoid of merit.

THE DANGEROUS DRUG TRIAL

I

All of the appellants claim that they were prejudiced by misconduct of the prosecutor. The principal witness for the government was John Durden who had been caught by federal narcotics agents and apparently decided to cooperate by assisting the agents in their efforts to secure evidence against his fellow conspirators in hopes of receiving lenient treatment for himself.[2] During the course of the trial, Durden's credibility was frequently and vigorously attacked. One of the principal lines of assault comprised asking Durden whether in fact the pending indictment against him was going to be dismissed in consideration of his testimony against the defendants. To this question, he answered **"no."**

Appellants argue that, by allowing such testimony to go uncorrected, the prosecutor was acquiescing in the knowing use of false evidence in the manner forbidden by *Napue v. Illinois,* 360 U.S. 264 (1959), and more recently condemned in *Giglio v. United States,* 31 L. Ed. (2) 104 (decided February 24, 1972). However, such an argument is based upon the premise that a promise of dismissal had definitely been made to Durden and that this alleged promise was known to the prosecution. The government has at all times denied such a promise, and there is no evidence in the record to the contrary.

As a corollary to their "false evidence" argument, appellants contend that the trial court committed reversible error by not allowing them to argue to the jury that Durden's testimony was not worthy of belief since he had been promised a dismissal if he testified against the defendants. The trial judge stated he would allow counsel to argue that Durden had great *expectations* of a dismissal as anyone in a similar position would have. Under the circumstances, it was not unduly restrictive to prevent counsel from arguing that a dismissal was *in fact* forthcoming. Moreover, because the closing arguments are not before us, a proper evaluation of the issue is foreclosed.

II

All of the appellants challenge the admission into evidence against them of certain items seized by the police: a ledger taken from the purse of Mrs. Rodriguez, the wife of co-defendant Manuel Rodriguez, various scraps of paper with writing thereon taken from a trash container in front of the home of Leo Lovato, an indicted co-conspirator who fled before the trial, and two ledgers and some papers seized from a footlocker found in the garage of Leo Lovato. The bases of attack are that the items were secured by illegal searches and seizures and should have been suppressed and that the items lacked any foundation or authentication and were inadmissible.

As to the search of Lovato's trash container and locker, the trial court correctly ruled that the Butlers and Arias lacked standing to move for suppression.[3] Neither the Butlers nor Arias had any proprietary interest in the items in question, nor were they persons against whom the searches in question were directed. *Alderman v. United States,* 394 U.S. 165, 173-75 (1969); *United States v. Shea,* 436 F.2d 740 (9th Cir. 1970); *United States v. Toliver,* 433 F.2d 867 (9th Cir. 1970), *cert. denied,* 401 U.S. 913 (1971).

Regarding the ledger book seized from Mrs. Rodriguez, both appellant Rodriguez and his wife submitted affidavits in connection with the pre-trial motion to suppress, swearing that the ledger book belonged to Manual Rodriguez. Assuming, without deciding, that Rodriguez did have standing to move to suppress, examination of the circumstances surrounding the seizure reveals that the police did not overstep the bounds set by the Fourth Amendment. Rodriguez was arrested pursuant to information that there was a warrant for his arrest for federal narcotics laws violation. At that time, Rodriguez was sitting in a car in a parking lot along with his wife and son; the latter was in the driver's seat. After the arrest of Rodriguez, he and his son were questioned regarding the registration of the vehicle. The son said the car belonged to his father, whereas Rodriguez stated that he had borrowed the vehicle from a friend. A radio check revealed that the license plates on the

vehicle were registered to another vehicle. Mrs. Rodriguez and the son were questioned further regarding the vehicle's registration and, upon their failure to give satisfactory explanation, were placed under arrest for suspicion for grand theft auto. Pursuant to that arrest, Mrs. Rodriguez was subsequently "booked," at which time the contents of her purse were inventoried and the ledger in question was recovered. Even though subsequent investigation revealed that the car was not in fact stolen, it is clear that the officers had probable cause to believe that a crime had been committed by all three of the Rodriguezes, which, of course, provided legal justification for their arrest. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). A warrantless search of personal possessions at the station house pursuant to a valid arrest does not violate one's Fourth Amendment rights. See, for example, *Charles v. United States*, 278 F.2d 386, 388 (9th Cir. 1960).

Counsel for Rodriguez cites *Whiteley v. Warden*, 401 U.S. 560 (1971), arguing that the arresting officers could not base their arrest of Rodriguez upon the mere report received via radio that there was an outstanding warrant for Rodriguez's arrest. In *Whiteley*, a sheriff had secured an arrest warrant based on his own conclusory statement that Whiteley had broken and entered a building, and then radioed a bulletin containing a description of the suspect, of the car he was driving, and of the amount and type of money

he was suspected of taking. Acting on the bulletin, an officer arrested Whiteley, searched his car and recovered damaging evidence against him. The Supreme Court held that the warrantless arrest based upon the radio bulletin could not supply the element of probable cause that the sheriff issuing the bulletin lacked, and so ruled that the seized evidence should have been suppressed.

Here, at the time of Rodriguez's arrest, there were two valid arrest warrants outstanding. One was issued by the district court pursuant to the return of an indictment charging Rodriguez with the crime of which he was ultimately convicted, and the other issued by a Magistrate upon an affidavit which adequately set forth the facts underlying the charging officer's conclusions, and so was sufficient to support an independent judgment that probable cause existed for Rodriguez's arrest. See *Spinelli v. United States,* 393 U.S. 410 (1969) and *Aguilar v. Texas,* 378 U.S. 108 (1964).

III

Aside from the question of the search, it is argued that all of the items seized lacked any foundation or authentication and so were inadmissible against the appellants. The government failed to present any proof that the writings were in the handwriting of any of the appellants, or of when the writings were made.

It is the function of the trial court to determine whether proffered evidence has enough prima facie trustworthiness to warrant its consideration by the jury, and generally the sufficiency of a showing of authenticity of a writing sought to be introduced into evidence is a matter within the discretion of the trial judge. *Arena v. United States*, 226 F.2d 227, 235 (9th Cir. 1955). Appellants insist that the mere contents of a writing which is purported to be authored by a particular person are insufficient evidence of genuineness. See 7 J. Wigmore, Evidence § 2148 (3rd Ed. 1940). However, circumstances extrinsic to the document may point with sufficient certainty to the person or persons who created it to allow the jury to consider the document. See, for example, *United States v. Sutton*, 426 F. 2d 1202, 1207 nn. 34-36 (D.C. Cir. 1969) and cases cited therein.

When Leo Lovato was placed under arrest at his residence, and in response to inquiry about dangerous drugs, he pointed out to the officers the location in his attached garage where the drugs could be found. The drugs were in boxes and a footlocker, the latter also containing two ledgers and various papers. The contents of the ledgers lead one to the obvious conclusion that they were records of a drug business. One of the ledgers seized from Lovato's Locker appears to contain a running account of distribution to the co-conspirators; under each of their names, each entry is dated, units of "R" and "W" or in some cases "Reds"

and "Whites" are recorded, and dollar amounts are noted next to the entries. The other ledger contains similar notations, but with the additional entries of, e.g., "C#1," "C#2," etc., "Pd $20 tip C#8," "Pd $250 to driver" and "Pd in full." Similar notations were contained on the slips of paper found in Lovato's footlocker. Also, some of the entries corresponded exactly with transactions about which there was independent evidence in the form of tape-recorded conversations and testimony of John Durden. Considering the reality that proof of conspiracies must often rely heavily upon circumstantial evidence [See *Diaz-Rosendo v. United States,* 357 F.2d 124, (9th Cir. 1966), *cert. denied,* 385 U.S. 856 (1966), and *Davenport v. United States,* 260 F.2d 591, 598 (9th Cir. 1958)], and given the circumstances of this case, we find ourselves in agreement with Professor McCormick:

> Should not the practice of accepting as prima facie genuine a document which comes from a natural custody be extended beyond the field of public duty, and be recognized for writings found in private custody? It seems that it should, but that here the practice should be discretionary and that if the judge finds that the purport of the writing and the fact that it was found in a place and custody natural for such a paper, and the other attending circumstances, make its genuineness substantially probable, it should come in.[4]

The same conclusion was reached in *People v. Ramsey,* 83 Cal.App.2d 707, 189, P.2d 802 (1948) in dealing

with a similar situation. At defendant's home, where an alleged abortion occurred, a looseleaf notebook was found in a cupboard beside a telephone where an appointment book would usually be kept. The notebook contained entries showing a date, time, name, address and telephone number which were consistent with the alleged abortion. The Court ruled that the notebook was admissible, despite the fact that neither authorship nor when the entry was made was shown.

Since the ledgers and other papers taken from Lovato's footlocker are technically hearsay, an alternate theory of admissibility is that they constituted an admission by Lovato. Here, Lovato in effect identified the documents as his own by directing the agents to his "business store-room" where they were found with his contraband merchandise. The circumstances here provide a much more reliable index of genuineness than, for example, an unsigned letter found on a defendant's premises with no independent evidence to demonstrate a meaningful connection. See *Poy Coon Tom v. United States,* 7 F.2d 109 (9th Cir. 1925).

Admissibility as to Lovato does not end the inquiry—the question of admissibility as to appellants remains. However, the trial judge properly instructed the jury that, if they found a conspiracy did exist and that a defendant was a member of the conspiracy, then the statements and acts of those found to be members of the conspiracy (as Lovato) may be considered by the jury as evidence in the case as to any defendant

found to have been a member, provided such statements or acts were knowingly made or done during the continuance of the conspiracy, and in furtherance of some object or purpose of the conspiracy. In this case, the evidence was overwhelming that a dangerous drug conspiracy and a heroin conspiracy did exist, and the majority of the testimony, including the tape-recorded evidence in both the dangerous drug case and the heroin case could easily have supported a finding by the jury that Leo Lovato was a member of each of the conspiracies. The contents of the ledgers and other papers appear on their face to have been written during the course of the conspiracy and in furtherance of the objects of the conspiracy. Such evidence, coupled with the independent evidence of each of the defendant's participation in the conspiracy[5] was sufficient to allow the jury to consider the ledgers and other papers taken from Lovato's footlocker as to each defendant.

The scraps of paper taken from the trash of Lovato do not qualify under either of the rationales used to admit the ledgers and other papers taken from the footlockers. There is a great difference between a defendant identifying to arresting officers the whereabouts of contraband and records of contraband transactions and merely finding discarded memoranda in a person's trash. The nature of the contents of the scraps recovered from the trash also leaves much to be desired as far as providing circumstantial evidence

of their genuineness. Most of them apparently contain no more than doodles, unrelated telephone call messages (e.g., "Johny will call back") and lists of numbers with letters beside them which could easily be taken as reflections of transactions merely contemplated rather than records of transactions actually planned or completed. We, therefore, hold that the admission of the scraps of paper recovered from Lovato's trash was error. However, in view of the other evidence in the case, the error was harmless.[6]

We take a similar view of the introduction in the dangerous drug trial of the ledger book seized from the wife of Rodriguez. Only twelve of the seventy-five pages of the book contained writings which the trial judge deemed sufficiently relevant to admit into evidence, and even those pages present a rather sketchy and confusing picture. It is unnecessary to reach the question of the admissibility of the ledger because, as stated above, any error could only be harmless.

IV

Rodriguez complains that some of the tapes that were heard by the jury contained prejudicial statements; the primary complaint is with respect to a statement by Joe Lovato that "He'll [referring to Rodriguez] go tonight and kill somebody, or something." We hold that the admission of such a statement was not reversible error for two reasons. First, taken in context, it is highly unlikely that the jury could have

understood the statement to mean that Rodriguez was actually going to commit murder. The full statement was, "The other thing is that Manuel, they don't play with Manuel and Manuel might get in some trouble you know, that way. He'll go tonight and kill somebody, or something." It seems apparent that Joe Lovato was merely trying to communicate that Manuel (Rodriguez) was a bit too impulsive to stay out of trouble as far as some were concerned, so that he was not to be trusted fully. The second reason is that the trial judge immediately instructed the jury to disregard the statement about killing. In our view, the combination of these two factors made the error, if there was any, harmless.

V

All of the appellants argue that the evidence taken in the light most favorable to the government showed the existence of multiple conspiracies rather than a single conspiracy and that, therefore, the judge committed reversible error by refusing to instruct the jury on the possibility of finding multiple conspiracies. Principal reliance is placed upon *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Supreme Court found that only one of the defendants had participated in a number of separate and distinct conspiracies with a number of different individuals, and so there was no conspiratorial nexus tying all of the defendants together in a conspiracy common to all. The rationale

of the decision was that it was highly prejudicial to the defendants to allow all the evidence of the separate crimes to be introduced against all of the defendants to prove a single crime.

We think that this case is controlled by the law set forth in *Blumenthal v. United States,* 332 U.S. 539 (1947). In that case, three salesmen separately agreed to distribute illegal whiskey for two other defendants, who had an agreement between themselves; no salesman knew or had any dealings with any other salesman and each was geographically far from the others. The Court distinguished the *Kotteakos* case and found that only one conspiracy existed:

> By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal. 332 U.S. at 558.

Here, the evidence was very persuasive that most of the co-conspirators not only knew of the others, but that all knew of and participated in the illegal plan of distribution of the amphetamines and barbituates. Under such circumstances, we hold that it was not error for the trial court to refuse to give an instruction on the possibility of finding multiple conspiracies.

VI

During the course of the trial, some of the attorneys for the defense were occasionally excused for short times to attend to other matters. Each time, other counsel agreed to represent the interests of the absent attorney's client. Appellant King contends that such occasional "pinch hitting" deprived him of his right to counsel, or at least his right to effective assistance of counsel. However, no objections were made by King during the course of the trial to this procedure; on the contrary, he specifically consented to it the two times that his counsel was absent. Although such a practice may be questioned, it is well settled that where, as here, there was no plain error, one may not raise on appeal that to which he did not object at trial. *United States v. Markham,* 440 F.2d 1119 (9th Cir. 1971); *White v. United States,* 315 F.2d 113 (9th Cir. 1963), *cert. denied,* 375 U.S. (1963); *Grant v. United States,* 291 F.2d 746 (9th Cir. 1961).

We find the remainder of appellants' argument to be without merit.

Affirmed.

FOOTNOTES

1. Appellant King asserts the same error was committed in his trial involving dangerous drugs.

2. The Butlers and Rodriguez assert in their briefs, and the government has not denied, that about two months after the convictions challenged here, the indictment against Durden was dismissed by the government.

3. Rodriguez also moved to suppress the material taken from Lovato's footlocker. Apparently the trial judge never ruled on Rodriguez's motion [Clerk's Record, p. 306].

4. C. McCormick, Evidence § 191, p. 403 (1954). *See also* 7 J. Wigmore, Evidence § 2160 n. 4 (3d Ed. 1940), and cases cited. Wigmore is cited as sole authority in *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504, 513 (S.D. N.Y. 1951).

5. Taken in the light most favorable to the government (*Glasser v. United States*, 315 U.S. 60, 80 (1942)) the other evidence with respect to the dangerous drug conspiracy was as follows:

Amphetamines and barbiturates in the form of pills were packaged in plastic bags, which were concealed in the paneling of cars, and the "load" cars were driven across the border to various places, apparently at the direction of Joseph Damian Lovato (hereinafter "Joe Lovato"). Also at the direction of Joe Lovato, generally defendant Hilaria Aguilar, known as "Rosa," would call Durden and tell him where to pick up an incoming load car.

Durden would then pick up the load car, dismantle it to retrieve the contraband, hide the contraband, and return the load car to the same place it was picked up. Then Durden would generally check back with Rosa, who informed him to whom he was to distribute the drugs, apparently on a consignment basis.

According to Durden's testimony, he first met Manuel Rodriguez in the company of Joe Lovato [R.T. 605]. Joe Lovato asked Durden to hold some drugs for him while he (Joe) made a trip into Mexico [R.T. 607], to which Durden agreed. Manuel Rodriguez then took thirty bags of "reds," each containing five thousand pills, from his own car and placed them in the trunk of Durden's car [R.T. 607-608].

Durden also testified that he distributed loads of pills to Manuel Rodriguez on a number of occasions [R.T. 628-629, 654-655 and 940-941]. Durden also testified that Rodriguez had supplied Durden with pills [R.T. 610-615].

According to the testimony of narcotics Agents Sternaman and Tarallo, while surveiling the residence of Joe Lovato, Rodriguez was seen in the company of Vincent Arias, exiting Lovato's residence. Rodriguez and Arias drove away together, went into a restaurant and returned in a while to Lovato's residence. While the two were at the restaurant, a dark brown ledger was observed by Agent Tarallo on the seat of the vehicle the two were in [R.T. 1212-1213 and 1316-1318].

A fellow employee of Rodriguez testified that Rodriguez got up abruptly from an interview at his company's personnel office upon sighting a police car through the window and trotted away [R.T. 1387-1389]. The officer who arrested Rodriguez confirmed the testimony regarding his attempted flight [R.T. 1570-1572].

A fingerprint expert testified that Rodriguez's fingerprints appeared on four separate pages of a ledger book recovered from the purse of his wife, who was also arrested with Rodriguez [R.T. 1592-1593]. Agent Tarallo testified that the same ledger book was the one he had earlier seen on the seat of the vehicle which Arias and Rodriguez had taken to the restaurant from Joe Lovato's residence [R.T. 1610].

The ledger book taken at Rodriguez's arrest contained lists of "R" and "W" ("Whites" is a term which also is used in that exhibit) under peoples' names, dated within the period of the conspiracy. These dates substantially coincided with the dates of deliveries to Leo Lovato as evidenced by the latter's ledgers.

Agent Sternaman testified that on April 1, 1970, he and Agent Clemente arrived as Manuel Rodriguez was being booked into jail [R.T. 1623]. He examined the ledger book which had been taken from Mrs. Rodriguez, told the jailers of his interest in it as evidence and of his intention to take it later [R.T. 1649]. Sternaman thereupon advised Rodriguez of his rights and ascertained that Rodriguez understood these rights [R.T. 1624]. Sternaman, while leafing through the book, asked Rodriguez what the "W" and "R" stood for. Rodriguez responded by smiling and shrugging [R.T. 1628-1629, 1655]. When asked if the letters stood for drugs, Rodriguez shrugged and smiled faintly again [R.T. 1655]. (The Court instructed that the jailhouse interview testimony was to be taken only as to Rodriguez [R.T. 1654].)

Durden testified that Arias received five separate loads of amphetamines and barbiturates, totalling nearly a million pills from Durden from the middle of August through the first week of September, 1969 [R.T. 620-630 and 647]. Durden also testified that Arias called him several times during the period of the conspiracy and inquired as to whether Durden had anything on hand [R.T. 768].

Durden testified that Charles King came to Durden in June, 1969, and received twenty thousand or twenty-five thousand reds [R.T. 612-614]. Two more loads of five thousand or ten thousand pills were distributed by Durden to King in August, 1969 [R.T. 628-629 and 654-655].

In a taped telephone conversation between Durden and Robert Butler, in response to inquiry by Durden as to whether Lovato would have "something" for Durden, Butler replied, "He's all empty . . . he only got those 30, 30, 35 I think. The ones he got from those other people. And he hasn't got anything in since then. He bought these from another source and these people charged him 5 over what he normally was going." Robert Butler also stated to Durden, "I told him I'm going over there with him next time . . . trip coming up here you know." [Transcript of Recording, pp. 227-229].

In another conversation with Durden, Robert Butler asked Durden whether he could get some older model cars for Joe Lovato and Robert Butler [R.T. 697 and 702-704].

Durden testified that he had seen Robert Butler at one time accompanying Joe Lovato, and that there was conversation between Butler and Lovato about load cars. In response to a statement by Lovato that another load car would be in that night, Butler replied that he wanted either one hundred thousand or two hundred thousand "reds" and thereafter engaged in a conversation with Lovato about such a drug transaction [R.T. 745-749]. Lovato then made a telephone call, asking the other party whether there were "20 big ones or 20 pillows" available. Shortly thereafter, Leo Lovato arrived and immediately left with Robert Butler. Soon thereafter, Leo and Robert Butler returned, whereupon Butler made a telephone call and asked for money and said, "I have got the stuff." [R.T. 768-772].

Ted Butler was accompanying Durden when he was arrested by undercover Agent Sternaman for attempting to sell Sternaman fifty thousand reds and fifty thousand whites [R.T. 661-663].

In their jail cell, Durden explained Lovato's dangerous drug operation to Ted Butler. Butler expressed to Durden that he had not previously been aware of what had actually occurred but that as long as he was involved now, he would like to get fully involved in the operation. Durden had not proposed that Ted Butler get involved; Butler volunteered [R.T. 668-673].

The day after Durden and Ted Butler were released from jail, they went to a telephone booth and, with Ted Butler waiting in the car, Durden called Joe Lovato [R.T. 674-675]. When Lovato told him there was another car in, Durden told him he would call back. Durden then told Ted Butler about the car and suggested that they find some place new to store the load; Butler agreed [R.T. 675]. The two men drove to another person's house to find if they could keep the drugs there, but the individual was not there. Since they were leery that agents might be following them, Durden decided that it would be best not to store this load [R.T. 675-676].

The weekend after Durden was released from jail, he met with Joe Lovato and Vincent Arias and told them that Ted Butler had been arrested with Durden [R.T. 679-680]. Ted Butler soon became involved with Lovato in acquiring dangerous drugs. Ted Butler once presented Durden with $580 to pay to Joe Lovato as one payment for Butler's prior acquisition of twenty thousand barbiturates [R.T. 980, 984]. The total payment was $1,100; Butler had previously paid Lovato $520 [R.T. 984-985].

On November 19, 1969, Durden called Joe Lovato. Lovato told Durden that there were three barrels of reds and one of whites across the border which he wanted somebody to go down and pick up [Transcript of Recording, pp. 287-288]. Lovato wanted Durden to get a car in which to "hide them" [Transcript of Recording, p. 288]. Durden called Ted Butler, who stated that he would pick up the load with Durden [R.T. 735-736].

The independent evidence of participation in a conspiracy to conceal, transport and sell heroin by the Butlers is similarly persuasive. Durden testified that when he first met Robert Butler through Joe Lovato (who was indicted but failed to appear for trial) on October 30, 1969, heroin trade was discussed. The same subject was discussed by Robert Butler and Durden alone again the next day, and Robert Butler said that he would have to "go back to Ohio" to get a sample due to the poor quality supplied by Joe Lovato.

Durden was present on November 3, 1969, when Robert Butler and Joe Lovato met to discuss the purchase of heroin. A small purchase was made by Robert Butler, and arrangements were made by Butler to buy more "if the stuff was good."

About December 8, 1969, Durden talked with Robert Butler about his recent trip east. Later on that day, Joe Lovato, Robert Butler and Durden had a conversation at the Torch Club about "eastern business." Durden and Robert discussed the heroin Butler was to get to take east in monitored telephone calls, which were played at the trial.

Durden testified to several conversations between Joe Lovato and Robert Butler wherein Robert and Durden agreed to help Joe find "load cars"—old automobiles that could be used to transport heroin from Mexico into the United States without losing too large a sum if the smuggling was caught and the cars confiscated. Robert Butler delivered keys for such a car to Lovato.

Another meeting between Joe Lovato and Butler, with Durden present, produced further details of Robert Butler's distribution of Lovato's heroin in several eastern cities [R.T. 90-92]. It was one of Robert Butler's functions,

along with Durden, to acquire the load cars to enable Lovato secretly to smuggle heroin from Mexico [R.T. 171-172].

Ted Butler, in December, 1969, called Durden relaying Lovato's desire to get back some heroin mistakenly given to Durden [R.T. 79]. Leo Lovato once gave Ted Butler two ounces of heroin for Durden. Butler held this heroin for a period of time and finally sold it [R.T. 95]. This transaction was supported by Ted Butler's recorded telephone conversation in December which showed that he had received some heroin from Leo Lovato [R.T. 535; Transcript of Recording, pp. 363-364]. Later, in a recorded conversation, he said he had sold two ounces of heroin to a person named Thomas King [R.T. 538; Transcript of Recording, p. 399].

6. See text at note 5, *supra*. Furthermore, the ledgers from Lovato's footlocker provided additional strong circumstantial evidence.

APPENDIX "B"

No. 71-1029
71-1030

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
vs.)
ROBERT BUTLER and)
TED DEAN BUTLER,)
Defendants-Appellants.)

PETITION FOR REHEARING

To the Honorable Judges Barnes, Ely and Wallace, Circuit Judges:

Robert Butler and Ted Dean Butler respectfully petition for rehearing of the decision of this Honorable Court convicting them, and each of them, for conspiracy to possess for sale and to sell dangerous drugs, amphetamine tablets and barbituate capsules in violation of Title 21 USC Sec 331(q) and 18 USC Sec. 371, and with conspiracy to conceal, transport and sell heroin in violation of 21 USC Sec. 174 and 18 USC Sec. 371, on the following grounds, to-wit:

1. The Court erred in matters of law in its opinion.

2. The Court erred in matters of fact in its opinion.

3. The Court failed to rule on important questions of law raised by appellants and failed to assert that the errors committed did not fatally infect the verdicts, and each of them, beyond a reasonable doubt. (*Chapman v. California* 386 US 18, 17 L.ed.2d 705)

4. The Court also failed to rule on whether the defendants were once in jeojardy at the end of the first trial and whether a second trial could be had on the same indictment after a verdict of guilty as to the first trial, thus barring the second trial on the same indictment because the defendants Butler had been once in jeopardy.

The Court states that the appellants together charge 62 errors in this appeal. The Court has not ruled on several of them and has not declared that any one of the 62 errors did not fatally infect the verdicts against the appellants.

The Court treats the electronic surveillance as the law existed in 1969 and 1970 under the decision of *U.S. v. James A. White,* 401 US 475, 28 L.ed.2d 453, who was indicted in 1966 and whose case was passed upon as to the alleged activities existing at that time. Since then, the Congress has passed Chapter 119 of Title 18, Sec. 2510-2520, expressing the limitations of wire interception and interception of oral communications. (Title 18, Secs. 2510-2520) It has only per-

mitted interception in certain types of cases (Sec. 2515 of Title 18) and only upon an application to a Judge of a Court of competent jurisdiction. Title 18, Sec. 2518 provides for the procedure and provided for the procedure necessary to intercept oral communications and required a full statement of probable cause on which the Magistrate or Judge could rule and the period of time during which such interception is authorized and when that interception may terminate.

The conversations between Durden, who was actually acting as a government agent, and the defendants was in no way authorized by any Magistrate or in conformity with the provisions of Title 18, Sec. 2518, and we believe that sound law as set forth by Congress in this Chapter rebuts and refutes the authority to proceed as Durden did, the voice being the voice of Durden but the words being those of the federal agent sitting alongside of him. Durden was playing Charlie McCarthy to the government's Edgar Bergen. We think this was trickery and fraud forbidden by the Fifth and Fourteenth Amendments to the Constitution of the United States.

In *Lisenba v. California,* 314 US 219, 237, 86 L.ed. 166, 180, the Court said: "If, by fraud, collusion, trickery and subordination of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured and used in the trial."

There was a showing that there was a corrupt bargain with Durden by which it was agreed that Durden's case would be dismissed if he testified against the defendants. Durden denied this during the trial but subsequent to the trial his case was dismissed, thus corroborating in fact what he had denied in the trial itself. The Fifth and Fourteenth Amendments forbid this. (*Lisenba v. California,* 314 US 219, 86 L.ed. 166, supra)

The electronic conversation which was introduced before the Court and jury was an alleged recitation of past events. It was not "criminal activity which was being thwarted." Neither defendant was shown to be committing a crime in any of the conversations. There was conversation in which Durden sought to affirm his own criminal activities but none that involved the Butlers. At no time was Robert Butler ever shown to have been in possession of any narcotic nor was there any testimony that he was intending to be. Only one transaction involved Ted Butler and that was as an employee of the arch criminal Durden, whose case the government saw fit to dismiss and at the same time the indictment against Durden joined Ted Butler and it too was dismissed, leaving Ted Butler convicted herein.

The Court misconceives our position in regard to the recordings. If the officer or agent sitting next to Durden was himself to call up the defendants and to seek a confession or admission, it would be neces-

sary under the law to lay a foundation as to its free and voluntary character and as to the necessity of giving the defendant a *Miranda* warning. We do not believe that he could do indirectly what he could not do directly and under the authority of *Lisenba v. California,* 314 US 219, 86 L.ed. 166, *supra,* and other cases, and the Wire Interception and Interception of Oral Communications Act, Chapter 119. Such evidence was inadmissible and improperly received.

Furthermore, the tapes were improperly read to the jury and included the other half of the conversations which were hearsay and without which the other parts of the conversation were unintelligible and should therefore have been inadmissible.

The Court says in reference to the statement that a promise of dismissal had definitely been made to Durden and that this alleged promise was known to the prosecution: "The government has at all times denied such a promise, and there is no evidence in the record to the contrary." Surely actions speak louder than words. The dismissal of all charges against this arch smuggler shortly after the case terminated can leave this Court with no other inference than such a promise was made to Durden and his attorney.

The record does not show that in the oral argument government counsel admitted in response to a question by Judge Ely that he had contemplated reducing the charge to a misdemeanor without advising

defense counsel of the situation. We now have in practice, especially in the State courts, what is known as plea bargaining, in which the prosecutor must disclose fully any and all promises made. We think that due process requires such exposure under *Napue v. Illinois*, 360 US 264, *Brady v. Maryland*, 373 US 83, 10 L.ed.2d 215, and *Giglio v. U.S.*, 31 L.ed.2d 104.

In connection with the pleas of once in jeopardy, the Court has not seen fit to pass on them. They were entered after the first trial.

With respect to the lack of proof that the articles referred to were in fact amphetamines or dangerous drugs, the government chemist failed to be able to give even the chemical formulas and only examined a few of the items which Durden produced. None were produced as to anything in the possession of or known to have been in the possession of either of the defendants Butler.

The Court had before it in reference to other parts of the case the discovery of articles taken from trash bag of Lovato and the issue of whether trash bags may be the subject of illegal searches and seizures now is before the United States Supreme Court in the case of *People v. Krivda* from the Supreme Court of California, in which a decision by the majority of the Supreme Court of California held that the trash bags were protected by the Fourth Amendment and not subject to searches and seizures and the matter will be

argued in the Supreme Court of the United States this fall session and would affect that part of the case before this Court.

Also, we think that the Butlers had a right under the Sixth Amendment to cross-examine the witnesses in the case on all matters relating to the conspiracy charges and that *Alderman v. U.S.*, 394 US 165, 173, 175, should be re-examined. The State law of California permits such cross-examination. We respectfully submit that any person affected by the conspiracy charge ought to have the right under the Sixth Amendment to cross-examine any witness who appears for the prosecution on any phase of the case. The Butlers were barred from this right and their rights under the Sixth Amendment were therefore violated.

We also call attention of the Court to *Gelbard v. U.S.*, 33 L.ed.2d 179, in respect to the views of the Supreme Court on the right of individual privacy which was invaded in this case by Durden and the narcotic officers and that Durden's consent was not sufficient to overcome the protection of the privacy.

Also, the use of the telephone in California requires the consent of the telephone company and this Court did not pass upon that requirement either, as no consent was received from the telephone company. The case of *People v. Treiber*, 28 Cal.2d 657 holds "A connection through an individual subscriber telephone service was an unauthorized connection under

California Penal Code Sec. 640 unless it was made with the authorization of the subscriber as well as the telephone company . . . The subscriber cannot, without the approval of the telephone company, authorize a connection to a telephone wire. This section protects telegraph and telephone facilities from physical injury and safeguards communication of electronic communications."

Therefore, in California Durden had no authority, nor did the officers have any authority without the consent of the telephone company.

We pray for rehearing and reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellants Butler

APPENDIX "C"

Law Offices
MORRIS LAVINE
619-620 A. G. Bartlett Bldg.
215 West Seventh Street
Los Angeles, Calif., U.S.A.
90014
Telephone 627-3241

September 5, 1972

Hon. Stanley Barnes and

Hon. Judges Ely and Wallace

U.S. Court of Appeals
P.O. Box 547
San Francisco, California 94101

Re: USA v. Robert Butler and Ted Dean Butler,
Nos. 71-1029 and 71-1030

Your Honors:

In petitioning for rehearing, because of the holiday we were unable to present and point out certain errors of fact and law in the opinion of the Court of Appeals and therefore supplement it with this letter.

The opinion says on page 1 of the typewritten opinion, lines 25 and 26: "With Durden's consent, the recordings were made by connecting *his* telephone with a tape recorder." This is an erroneous statement of fact. Durden was in the narcotics squad of the police

department, using the police telephone and phoning directly into the home or business of the Butlers and the recordings were made of words and statements requested by the narcotics officers sitting alongside of Durden. This was without the consent either of the telephone company or of the Butlers and was not on Durden's telephone but on a police telephone. This is not the *White* case nor the *Hoffa* case nor the *Lewis* case nor the *Lopez* case cited in the opinion.

The *White* case, 401 US 745, is a case in which the informant was wired by a concealed radio transmitter and the conversation took place in Jackson's home and not over the telephone.

This is not the *Katz* case, 389 US 347, nor *Silverman v. U.S.*, 365 US 505, nor any of the other cases dealing with electronic surveillance, nor *U.S. v. U.S. District Court*, 32 L.ed.2d 752, nor *Berger v. N.Y.*, 388 US 41.

In the case at Bench, the recordings were of a telephone connected from the police department to the home of the appellant. *Hoffa v. U.S.*, 385 US 291, cited by the Court, is a case where another Labor Union executive discussed the facts o fthe alleged attempted bribery with the paid informer in a hotel suite. No telephone connection between the police department of the defendant was involved.

In the case of *Lewis v. U.S.*, 385 US 206, a narcotics agent misrepresented his identity and was in-

vited into the home of defendant. The agent had on him a recording device to record the transaction. This was not the use of a telephone from the police station to the defendant, unconsented to by the telephone company and not approved in any way by any Judge or authority, and is not the case of appellant herein.

The other case cited by the Court, *Lopez v. U.S.*, 373 US 427, is also clearly distinguishable. In the *Lopez* case, the evidence showed that the defendant first made an unsolicited offer of money to an internal revenue agent for the purpose of obtaining his asistance in concealing any cabaret tax liability and that at a later meeting in the defendant's office the latter's improper overtures began almost at the outset of the discussion, which was wire recorded by a device carried by the agent. Again, the case is not a case where the agent or someone else acting for the agent and speaking the agent's words used the telephone to phone the defendant in that case, as done in the case at Bench.

The misuse of the telephone and the misuse of Durden to speak the words of the agent into the telephone for the purposes of recording the conversation, half of which only was submitted to the jury, is clearly in violation of *Katz v. U.S.*, Title 47, Sec. 605, U.S.C., the laws of the State of California prohibiting the use of the telephone except by subscribers thereto, the fact that this was a telephone belonging to the police department and not Durden, and in violation clearly of

the Fourth Amendment to the Constitution of the United States where the words and thoughts of the speaker were unlawfully seized.

In *Alderman v. U.S.*, 394 US 165, 171, the Court said: "The exclusionary rule fashioned in *Weeks v. U.S.*, 232 U.S. 383, 58 L.ed. 652, 34 S.Ct. 341 (1914), and *Happ v. Ohio,* 367 U.S. 643, 6 L.ed. 1081, 81 S.Ct. 1684, 84 ALR2d 933 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385, 391-392, 64 L.ed. 319, 321, 322, 40 S.Ct. 182, 24 ALR 1426 (1920). Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. *Silverman v. U.S.,* 365 U.S. 505, 5 L.ed.2d 734, 81 S.Ct. 679, 97 ALRD2d 1277 (1961); *Katz v. U.S.,* 389 U.S. 347, 19 L.ed. 576, 88 S.Ct. 507 (1967). * * * We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed. In this respect we are mindful that there is not a comprehensive statute making unauthorized electronic surveillance a serious crime. The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant. Without experience showing the contrary, we should

not assume that this new statute will be cavalierly disregarded or will not be enforced aganst transgressors."

The defendants and appellants have standing to challenge the seizure of their conservations unlawfully.

So far as Ted Butler is concerned, he was arrested at the same time Durden was arrested, at the very inception of Durden's arrest and seizure. Robert Butler was being telephoned to as well as Ted Butler to attempt to gather evidence. They were certainly direct parties in interest in these conversations which were seized without the consent of any Magistrate or any statute authorizing it. See: Omnibus Crime Control and Safe Streets Act, Public Law 90-351, 82 Stats. 211, 225.

The statement in the opinion, page 3, "At the time of the recorded telephone calls, appellants had not been indicted and were not represented by counsel as in *Massiah,*" this is also incorrect. Durden and Ted Butler were indicted and accused at the same time, at the outset of the relations between Durden and the government. It appears that he was in fact represented by counsel at the arraignment on this separate charge.

So far as Robert Butler was concerned, the investigation had in fact, for all practical purposes, reached the accusatory phase and Durden was trying to establish a case for the government against Robert Butler. It is incorrect to state that appellants were clearly suspected of criminal activities and were being investi-

gated. Ted Butler had already been accused and arraigned and so far as the officers and the government were concerned, so was Robert Butler accused but not yet indicted. The statements solicited from the Butlers, although their truth has been denied, were purporting to be narratives of past events. There is nothing in the telephone conversations which constituted committing a crime.

The case of *Grier v. U.S.*, 345 F.2d 523, 524, is clearly distinguishable and different. In *Grier v. U.S.*, an informer was carrying a pocket broadcasting device and government agents were listening to statements made by defendant during commission of an alleged offense. This is not the case at Bench, where Durden used the narcotic agent's telephone to phone into the home of Defendant Butler to discuss narratives allegedly of some past event or events and was not any proof of criminal activity thrwarted.

The Court also says that the great mass of hearsay evidence permitted to go before the jury was not pointed out. The transcript of the record of the statements made to Durden and his response was and is all before the Court and it would have taken a brief almost double the size of the other one to have specifically pointed these statements out. Nevertheless, practically half of everything that Durden said was doubled by the half that was inadmissible in evidence as hearsay yet was permitted to go before the jury. The Court admits, as it must, that to have excised all of Durden's

half of the discussions would have rendered the recorded conversations unintelligible, so we have a conviction based on 50 per cent of inadmissible testimony. We submit that this is prejudicial error.

The Court fails to point out the lack of foundation or sufficiency of proof of the so-called dangerous drugs, only a few samples of which were examined by a federal chemist who could not give the formula of even the few samples which they asserted they examined.

The Court also seems to have slid by or justified the misstatements of the prosecutor as to his intentions regarding a dismisal of Durden's case. The Judge commented in the thial that he would be very much surprised if the government dismissed the case against Durden. That surprise was awaiting him two months after the trial and speaks louder than words of what the prosecutor intended.

During the oral argument admissions were made by the prosecutor of his intentions which were not disclosed to the defense as required by *Brady v. Maryland,* 373 U.S. 83, *Giglio v. U.S.,* 31 L.ed.2d 104, and *Napue v. Illinois,* 360 U.S. 264. We ask the Court to have the oral argument of our case written up so that the exact statements by the government counsel and his reply to Judge Ely may be made a part of this record.

In reference to the right to challenge the use of information secured from the trash containers in front of the home of Leo Lovato, we wish to call attention to the fact that the U.S. Supreme Court now has before it the case of *People v. Krivda* for hearing from a decision by the Supreme Court of California, holding that these trash bags are private and not subject to seizure by government officers.[1]

We repeat and reassert all of the other errors raised by all counsel and respectfully ask the Court to grant a rehearing and to reverse the cases of the two Butlers.

Respectfully,

MORRIS LAVINE,
Attorney for Robert Butler
and Ted Dean Butler

---

[1]The Supreme Court of U.S. referred the trash bag case (*Krivda v. California,* 5 Cal. 3d 357) back to California's Supreme Court which held that information obtained from the bags violated both federal and state law and affirmed its previous reversal because of the illegal search and seizure 8 Cal. (3) 623.

ML:jyb
cc: U.S. Attorney
Norman Kaplan, Esq.
Barry Tarlow, Esq.

APPENDIX "D"

AMENDMENT OF OPINION AND DENIAL OF HEARING

Before: BARNES, ELY and WALLACE, Circuit Judges.

In connection with our discussion pertaining to the non-applicability of *Massiah* (slip opinion, page 3), we have reviewed the citations which we requested counsel to provide to us and find nothing *in the record* to substantiate the contention of counsel that Ted Butler was represented by an attorney when the telephone conversations with Durden occurred. But this is only a preliminary distinction. The conversations are clearly admissible under the reasoning of *Hoffa v. United States,* 385 U.S. 293, 304 (1966) and *United States v. White,* 401 U.S. 745, 752 (1971).

The opinion shall be modified as follows: at page 3 of the slip opinion, line 7, before the word "At" there shall be inserted "Aside from other reasons," and on page 3, line 8, between the word "calls" and line 9, the word "represented" there shall be inserted "the record does not demonstrate appellants had been indicted and were . ."

Also, the word "his" shall be deleted at page 2, paragraph 3, line 5, and the word "the" shall replace it. After the word "telephone" at page 2, paragraph 3, line 5, shall be inserted the words "he was using."

Under the facts of this case it makes no difference what telephone Durden was using.

The "double jeopardy" argument is summarily rejected. It was not mentioned in the opinion, along with over fifty other contentions which we deem to have no merit.

We have now reviewed the transcript of the closing arguments. The last sentence on page 4 of the slip opinion is deleted. Our decision on the issue remains the same.

The petition for rehearing is denied.

APPENDIX "E"

No. 71-1029
71-1030

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
vs.)
ROBERT BUTLER and)
TED DEAN BUTLER,)
Defendants-Appellants.)

PETITION TO RECONSIDER AND REHEAR MATTERS ON REHEARING AND OTHER MATTERS OVERLOOKED IN THE DECISION.

To the Honorable Judges Barnes, Eli and Wallace, Circuit Judges:

Come now Ted Dean Butler, No. 71-1030, and Robert Butler, No. 71-1029, and respectfully petition for rehearing of the amendment of opinion and denial of rehearing rendered by this Court February 7, 1973, and in respect thereto set forth as follows:

1. The Court erred in matters of fact and law in its amendment of opinion and denial of rehearing.

2. The Court omitted facts which should cause a rehearing and reversal.

3. The Court erred in procedural matters governing the plea of double jeopardy.

4. The Court erred in procedural matters concerning the law of conspiracy.

5. The Court failed to get a transcript of the proceedings on the oral argument which governs misconduct of the prosecutor in failing to reveal that he intended to grant Durden leniency or a dismissal, thus preventing the defendants from attacking and arguing the lack of credibility of Durden. (*Napue v. Illinois,* 360 US 264; *Giglio v. U.S.*, 31 L.ed.2d 104).

In its amendment of opinion the Court said: "In connection with our discussion pertaining to the non-applicability of Massiah (slip opinion, page 3), we have reviewed the citations which we requested counsel to provide to us and finding nothing *in the record* to substantiate the contention of counsel that Ted Butler was represented by an attorney when the telephone conversations with Durden occurred." Emphasis by the Court).

Surely, this Court must and does take judicial notice of the Court records which reveal that Ted Butler and Durden were arrested at the same time and jointly indicted in U.S. District Court in indictment No. 4847 AAH (Hauk) for violation of Section 331(q)(2),

(3) of Title 21, U.S. Codes, and that at all times Ted Butler was represented by counsel, including the times that Durden, sitting alongside of a narcotic officer and at the Bureau of Narcotics, telephoned Butler. Although the transcript of the record of this trial does not bring up the record of the proceedings before Judge Hauk, they were pending and Butler was represented at all times from his arrest to the time of his dismissal. Attorney Saul J. Bernard represented both Durden and Ted Butler until their cases were severed, at which time the Court ordered attorney Richard Kolostian to represent Ted Butler until the case was dismissed September 29, 1970.

Ted Butler was reindicted along with all of the other defendants in case No. 71-1030 on the same evidence presented to the grand jury that resulted in his indictment in the case 4847 right after his arrest. The fact that the record in 4847 AAH was not a part of the record of this trial did not alter the facts which this Court must consider and should correct its error. The records of the two Courts will demonstrate that Ted Butler was at all times, from the time of his arrest and first indictment, represented by counsel and was so represented when Durden was telephoning him.

Although the Court says further: "The conversations are clearly admissible under the reasoning of *Hoffa v. United States,* 385 US 293, 304 (1966) and *United States v. White,* 401 US 745, 752 (1971)," it has failed to distinguish this case from *Hoffa v. U.S.,*

385 US 293, 304 (1966), and *U.S. v. White,* 401 US 745, 752 (1971). Neither one of these cases involve the use of a telephone contrary to State law and without the consent, as required by California law, of the telephone company. (*People v. Treiber,* 28 Cal. 2d 657.) Neither *Hoffa* nor *White* involved the use of the telephone, nor did they require the consent of the telephone company under State law to use the telephone or to misuse the telephone.

We disagree with the Court's statement that under the facts of this case it makes no difference what telephone Durden was using. Under California law, Durden or any other subscriber is required to have the consent of the telephone company or its use was illegal. (*People v. Treiber,* 28 Cal. 2d 657.)

In the second place, Durden stood alongside of a narcotics officer and was virtually a dummy repeating the words of the narcotics officer. He was a Charlie McCarthy speaking for Edgar Bergen and conducting an inquiry which the narcotics agent himself could not do and that, we respectfully think, makes a reversible difference.

Furthermore, the telephone conversations only had half of the talk and was admittedly unclear without the other half being placed in the record.

Furthermore, the telephone conversations were mere recordings of past events and narrations of past events. They did not establish any conspiracy on the part of

either appellant or any participation in any alleged conspiracy.

The Court says "The double jeopardy argument was summarily rejected. It was not mentioned in the opinion, . . ."

There was only one indictment in this case, yet under the same indictment the defendants were placed on trial before two juries and two judgments rendered against them and two penalties imposed against them.

Defendants were obviously placed in jeopardy when they were placed on trial on the indictment.

Although when a man has done a criminal act the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once.

A criminal offense cannot be split up and prosecuted in part without violating the rule of law "that a man shall not be twice vexed for one and the same cause."

A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. (*Jackson v. State,* 14 Ind. 327; *In re Neilsen,* 131 US 118-123.)

Where a person has been tried and convicted for a crime that has various elements included in it, he cannot be a second time tried for one of those elements

without being twice put in jeopardy for the same offense. (*Cane v. U.S.*, 19 F.2d 472, headnote 4.)

The Fifth Amendment entitled us to a ruling on the plea of once in jeopardy and not a summary dismissal. (*Ex parte Lange,* 18 Wall. (85 U.S.) 153, 21 L.ed. 872.)

The power of the Court was exhausted when the first sentence was pronounced on the same indictment and the second sentence was wholly without jurisdiction and in conflict with the Constitution. (Fifth Amendment; *Shepherd v. People,* 25 NY 406.)

In the 50 or more questions raised by us and on which the Court has not passed, we believe we raised the issue of whether search of the wire fastened trash bag in front of Leo Lovato's residence (R.T. 1198-1200, 1330-1331) resulted in the finding of a phone number, the handwriting of which was unidentified, and which was testified to as the phone number of one of the Butlers. Since filing our brief the case of *People v. Krivda,* 5 Cal.3rd 357; 8 Cal. (3) was decided by the Supreme Court of California in which a majority of the Court of California held that the placement of one's trash onto the sidewalk did not permit the search of the bags and that such a search was contrary to the Fourth Amendment of the Constitution of the United States and Article 1, Section 19 of the Constitution of California. The case was taken to the United States Supreme Court, which Court held that it was not clear whether California had acted under federal law or

under state law. The Supreme Court of California, in 8 Cal.3rd 623, held that it acted both under the Fourth Amendment and under Article 1, Section 19 for the California Constitution as an independent ground of State action and ordered the remittitur to issue forthwith. The effect of this decision is to hold that the search of the trash bag and the finding of the telephone number involved was an illegal search and seizure and the use of that evidence was use of fruit of the poisonous tree and fatally infected the verdict.

The Court has failed to certify, as required by *Chapman v. California,* 17 L.ed.2d 705, that none of the 50 or more errors cited as well as none of those reviewed on rehearing and again challenged above did not fatally infect the result beyond a reasonable doubt.

WHEREFORE, appellants pray for reconsideration and rehearing.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT BUTLER, Defendant-Appellant.	)	No. 71-1029
ORDER		
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. TED DEAN BUTLER, Defendant-Appellant.	)	No. 71-1030

Before: BARNES, ELY and WALLACE, Circuit Judges.

The Clerk is directed to file the "Petition to Reconsider and Rehear Matters on Rehearing and Other Matters Overlooked in the Decision" which was lodged on behalf of Robert Butler and Ted Dean Butler.

IT IS ORDERED denied.

WALLACE
United States Circuit Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1213

TED DEAN BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1356

ROBERT BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Ted Dean Butler Pet. App. A) is reported at 472 F. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1972. A petition for rehearing was denied on February 7, 1973. On March 6, 1973, Ted Dean Butler's petition was filed.[1] Mr. Justice Douglas extended Robert Butler's time for filing a petition for a writ of certiorari to April 7, 1973, and the petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government suppressed evidence that it had promised that charges against the government's principal witness would be dropped.

2. Whether petitioners' trials before separate juries on each charge against them, pursuant to their own motion for severance, constituted double jeopardy.

3. Whether the evidence showed multiple conspiracies rather than two conspiracies, and whether the evidence was sufficient.

4. Whether 21 U.S.C. (1964 ed., Supp. V) 331(q) is unconstitutionally vague because it requires reference to 21 U.S.C. (1964 ed., Supp. V) 360a to determine which drugs are involved.

5. Whether entrapment was established as a matter of law.

6. Whether there were illegal searches or seizures.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were

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[1] Petitions for writs of certiorari have also been filed in this case by co-defendants Vincent Arias, No. 72-6538, and Manuel Rodriguez, No. 72-6535. We are responding separately to these petitions.

convicted of conspiring to possess dangerous drugs for sale and to sell dangerous drugs, in violation of 18 U.S.C. 371 and 21 U.S.C. (1964 ed., Supp. V) 331(q) (Count I). After a second jury trial, which had been severed from the first trial pursuant to petitioners' motion, they were convicted of conspiracy to conceal, transport, and sell heroin in violation of 21 U.S.C. (1964 ed.) 174 (Count V). Ted Dean Butler was sentenced to concurrent terms of two years' imprisonment on Count I and five years' imprisonment on Count V. Robert Butler was sentenced to concurrent terms of two years' imprisonment on Count I and seven years' imprisonment on Count V. The court of appeals affirmed (Ted Dean Butler Pet. App. A).

1. *The Government's Witness, John Durden.*

The government's primary witness at trial was co-conspirator John Durden. He testified that when some friends wanted drugs in June 1969, he obtained them from Joe Lovato,[2] whom he knew as a drug dealer (R.T. 576-578).[3] After this sale, Joe Lovato offered Durden a position selling drugs (R.T. 578, 581), which Durden accepted (R.T. 581-591). On September 9, 1969, Durden was arrested as he attempted to make a sale of amphetamines and barbiturates (R.T. 661-662). Petitioner Ted Dean Butler, who happened to be accompanying Durden, was also arrested (R.T. 662-667).

After the arrest and while in jail, Durden revealed to Ted Dean Butler that he was involved in a drug operation headed by Lovato (R.T. 668-669). Butler stated

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[2] Co-defendant Lovato fled from custody and now resides in Mexico. His cousin, co-defendant Leo Lovato, has also absconded to Mexico.

[3] "R.T." refers to the reporter's transcript of the trial; "Jury Tr." refers to a transcript of taped telephone conversations submitted to the jury.

he had not been aware of what was occurring, but now "might as well just go ahead and try and do my thing," and work with Durden in the drug operation (R.T. 671-672). At the time Durden had not begun cooperating with the government and, in any event, did not propose that petitioner become involved; petitioner volunteered (R.T. 668-673). According to Durden, petitioner thereafter became a part of the illicit drug operation by transporting and selling dangerous drugs for Lovato and distributing them to various customers (R.T. 978-980, 983-985, 674-675, 735-736, 750-751, 773-775).

After Durden's arrest, narcotics agents were first unsuccessful in their attempt to get him to cooperate with them (R.T. 681-682). Finally, in the middle of October 1969, after he had been indicted, Durden agreed to cooperate fully with the agents (R.T. 685). Thereafter, the agents had Durden make telephone calls to participants in the drug and narcotics conspiracies and record these calls on tape (R.T. 708-709).

2. *The Dangerous Drugs Charge (Count I).*

In a recorded conversation on October 27, 1969, Joe Lovato told Durden that "Ted and Bob [*i.e.*, petitioners] have been dealing all along" and "Bob has been getting in plenty * * *. They got about seven * * * that was the day before yesterday * * * they got ten" (Jury Tr. 215-216). In another taped conversation on October 31, 1969, Durden called Robert Butler and inquired whether Lovato would have "something" for him. Robert Butler discussed the quantity of drugs which Joe Lovato had and commented that he would go with Lovato on his next trip to replenish his supply (Jury Tr. 227-299). Durden also testified about his and Robert Butler's meeting with Joe Lovato in November, 1969. Robert Butler at that time placed an order for

"reds".[4] During the meeting Robert Butler went away with Leo Lovato, Joe Lovato's cousin, and returned stating that he had received his order (R.T. 747-749, 768-773). There was also a late 1969 meeting of the conspirators, including Robert Butler, wherein the shortage of drugs was discussed (R.T. 773-775). On December 12, 1969, Durden engaged in another recorded conversation with Robert Butler in which Robert Butler told him that a car had arrived and complained that although Leo Lovato probably got the load "he didn't even pass it on to anybody at all" (Jury Tr. 374).

In a November 19, 1969 conversation Joe Lovato told Durden to pick up four barrels of pills in San Diego and hide them. Durden then called Ted Dean Butler, who stated he would help him pick up the drugs (R.T. 735-736, 978-980).

When Leo Lovato was arrested in February 1970 and asked about dangerous drugs, he pointed out to the arresting agent where the drugs could be found. Included with them in a footlocker were two ledger books he used in the conspiracy. In one of these ledgers (G. Ex. 21, 1st Trial), "Bob" had a separate page used solely for his transactions. Listed therein were two drug entries, one of "5 R", the other of "20 R". Petitioner Robert Butler's telephone number was listed in the same ledger book (G. Ex. 21, 1st Trial). Other pages in the book showed "Ted" had also been dealing in "Reds" and "Whites". The other ledger (G. Ex. 15, 1st Trial) taken from Leo Lovato, indicated a list of 27 cars arriving on various dates and containing various amounts of "R's" and "W's" (Reds and Whites). In this ledger a page was devoted to "Bob" indicating he had received "5 R" from "C

[4] "Reds" is the common term for barbiturates and "Whites" is the common term for amphetamines.

no. 15" on 12/5. A search of Leo Lovato's trash by government narcotics agents revealed amphetamine residues and a scrap of paper with Robert Butler's telephone number on it.

3. *The Narcotics Charge (Count V).*

Durden first became involved with heroin when, in October 1969, Joe Lovato told him he could supply him with that substance (R.T. 42). Durden testified that on October 30, when he first met Robert Butler through Joe Lovato at Robert Butler's dress shop, heroin trade was discussed (R.T. 47-49). The next day Durden talked with Robert Butler again, and Butler said he would have to "go back to Ohio" to get a sample of heroin due to the poor quality supplied by Joe Lovato (R.T. 51). Durden testified that he was present when Robert Butler and Joe Lovato met to discuss a heroin purchase on about November 3. Robert Butler gave Joe Lovato an unknown amount of money, and told Lovato that he would know the next day—after testing a "sample"—if he wanted to buy five or six "pieces" (ounces) of heroin Lovato had ready in Mexicali, Mexico (R.T. 52-53).[5]

On the telephone with Durden, Joe Lovato extensively discussed Robert Butler's role in the heroin conspiracy. At a January 13, 1970 meeting, where Durden and narcotics agent Gordon took delivery of some heroin from Leo Lovato, Lovato in the presence of Agent Gordon, discussed "Bob's" complaints about heroin quality (R.T. 260, 263-265). Durden testified that on or about the 8th of December, he spoke with Robert Butler, who had recently returned from a trip to several cities "back East" to assess the trade in heroin there (R.T. 90-91). Later, in a December 9th meeting with

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[5] Durden also testified that it was one of his and Robert Butler's functions to acquire the cars to enable Lovato to secretly smuggle heroin from Mexico (R.T. 171-172).

Joe Lovato and Robert Butler, Lovato confronted Robert Butler, saying, "[w]hat are you trying to do, start a business back East with my money" (R.T. 92-93).

Ledger books seized from Leo Lovato (G. Exs. 4, 5, 2nd Trial) showed "Bob" receiving many "Pcs" ("pieces", or ounces of heroin). A notebook contained a telephone number traced to Robert Butler (R.T. 551-552, 561).

Ted Dean Butler also became involved in the sale of narcotics. In a December 1969 recorded conversation he told Durden about receiving heroin from Joe Lovato (R.T. 535). Leo Lovato's ledger also showed that Ted Dean Butler had received heroin from the Lovatos during the period of the conspiracy.

ARGUMENT

1. Petitioners assert that they were prejudiced during their trial because the prosecutor suppressed the alleged fact that the government had promised Durden that the indictment against him would be dropped and falsely stated to the trial court that he did not intend to dismiss the indictment against Durden, the principal witness against petitioners (Tr. 1938). Petitioner Robert Butler attempts to support these contentions with an affidavit of his counsel reciting counsel's belief that the prosecutor intended to drop the indictment, and with other affidavits from the counsel of co-defendants Rodriguez and King reciting that prior to trial during plea bargaining the prosecutor had indicated that the charges against Durden probably would be dropped.[6] These affidavits were first submitted on appeal. At that time the government offered to submit counter-affidavits to the court of appeals, but this offer was rejected by the court as unnecessary. But even assuming *arguendo*

[6] About two months after the last trial the charges against Durden were in fact dropped.

the correctness of these affidavits, they provide no support for petitioners' contention that there was reversible error.

Durden testified that he had not been promised a dismissal in consideration for his testimony (Tr. 796), but he did admit that he hoped for leniency in exchange for his cooperation with the government (Tr. 951, 953-954). The court accordingly allowed the defendants to argue to the jury that Durden had "great expectations" of dismissal, as anyone in a similar position would have. Thus the defense was allowed to attack Durden's credibility by arguing that Durden was testifying in expectation of dismissal.

The affidavits offered by petitioner Robert Butler do not even purport to establish that the prosecutor made any "promise" to or "deal" with Durden. They show different expressions by the prosecutor of his personal intentions—not communicated to Durden—to dismiss or not to dismiss the indictment against him. Thus the prosecutor told the court, "May I state for the record I do not intend to dismiss the case against John Durden" (R.T. 1938); whereas he told the attorney for co-defendant Rodriguez, Ronald Bain, that "I probably will dismiss [Durden's] case, but I haven't told him about it yet." (Robert Butler Pet. App. B.) Whatever the prosecutor's actual intentions with regard to Durden, there is no suggestion that any promise was made to him but withheld from the court and co-defendants at trial. Therefore, this case is not like *Giglio* v. *United States*, 405 U.S. 150, or *Napue* v. *Illinois*, 360 U.S. 264, upon which petitioners rely. In each of those cases the government's principal witnesses were allowed falsely to testify that they had not been promised leniency by the prosecution and the defense was consequently precluded from using this suppressed information in attacking the witnesses'

credibility. Here, as the court of appeals noted (Ted Dean Butler Pet. App. A, p. 5), there is no evidence that any such promise was made, and in any event, the defense was allowed to attack the witness's credibility by arguing that Durden had great expectations of dismissal.

2. Petitioners argue that they were placed in double jeopardy because they were tried before two juries and received two sentences on one indictment. Since, however, these separate trials were granted upon petitioners' motion for severance, they have no cause for complaint. Cf. *Smith* v. *United States*, No. 72-6083, certiorari denied, April 23, 1973 (dissent of Justice Douglas). Moreover, separate trials on one indictment do not amount to double jeopardy unless the issues to be litigated are the same. *Ashe* v. *Swenson*, 397 U.S. 436. There is no suggestion of a duplication of issues here.

3. Petitioners further contend that evidence at each trial showed multiple conspiracies rather than a single conspiracy to distribute illegal drugs and that the court should have delivered instructions on multiple conspiracies. But as the court of appeals noted (Ted Dean Butler Pet. App. A, p. 16), the evidence was "very persuasive that most of the co-conspirators not only knew of the others, but that all knew of and participated in the illegal plan of distribution of the amphetamines and barbiturates." There was thus evidence at each trial of a single conspiracy and the trial judge correctly concluded that no special instruction on multiple conspiracies was required. See *Blumenthal* v. *United States*, 332 U.S. 539. The related claim that the evidence was insufficient to show that petitioners participated in the conspiracies charged in Counts I and V is refuted by our recital of the facts in the Statement, *supra*, which shows that petitioners' participation was substantial.

4. Petitioners assert that 21 U.S.C. (1964 ed., Supp. V) 331(q), under which they were convicted (Count I),

is unconstitutionally vague. The argument is that vagueness resulted because the prohibition against the sale of certain drugs in 21 U.S.C. (1964 ed., Supp. V) 331(q)(2) and (3) (subsequently deleted by Pub. L. 91-513) required reference to 21 U.S.C. (1964 ed., Supp. V) 360a(b) and (c)(1) to determine which drugs were considered illicit, requiring a citizen to search the United States Code to determine whether the drug sales he intended to make were prohibited. However, the doctrine of incorporation by reference is hardly unusual and clearly does not amount to constitutional vagueness.[7]

5. Petitioner Ted Dean Butler contends that Durden's participation in the conspiracy amounted to entrapment as a matter of law. But petitioner voluntarily joined the conspiracy *before* Durden became a government agent. Therefore, petitioner failed to establish any creative activity by the government amounting to entrapment. *Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. This Court recently rejected the contention that the participation of a government agent in the operational elements of a conspiracy amounts to a violation of due process. *United States* v. *Russell,* No. 71-1585, decided April 24, 1973.

6. Petitioners raise various search and seizure issues; none has merit.

a. Petitioners contend that Durden's activity collecting evidence as a government agent both by his direct

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[7] Petitioner Ted Butler also complains (Pet. 40-41) that the judge's instruction that amphetamine is a "stimulant" and barbiturate is a "depressant" within the terms of 21 U.S.C. (1964 ed., Supp. V) 360a denied him a jury trial. Clearly, however, this was a matter of law on which the judge could instruct the jury. It still remained for the jury to determine whether petitioners had conspired to possess or had sold such drugs.

observation and by his telephone conversations with the defendants amounted to illegal searches and seizures. As the court of appeals held (Ted Dean Butler Pet. App. A, pp. 2-3), however, statements and acts made in furtherance of a crime are not protected from direct observation by government agents or from electronic recording in telephone conversations with the consent of a party. 18 U.S.C. 2511(2)(d); *United States* v. *White,* 401 U.S. 745; *Hoffa* v. *United States,* 385 U.S. 293; see *United States* v. *Russell,* No. 71-1585, decided April 24, 1973; *People* v. *Canard,* 65 Cal. Rptr. 15, 29; *People* v. *Cruz,* 85 Cal. Rptr. 918; *People* v. *Caravella,* 85 Cal. Rptr. 576. Nor do the rights to *Miranda* warnings or assistance of counsel attach prior to arrest, while a crime is still being committed. Similarly there was no violation of *Massiah* v. *United States,* 377 U.S. 201, in these preindictment overhearings.[8]

b. Petitioners contend that the admission into evidence of a telephone number of Robert Butler and Charles King and some amphetamine residue, all found by federal agents in Leo Lovato's trash, and also a ledger seized at the time of Leo Lovato's arrest containing information about the distribution of drugs and narcotics to the defendants was error.[9] But as the court below

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[8] Additionally it was not error, as petitioners assert (Ted Dean Butler Pet. 40), to allow the jury to hear Durden's comments along with the defendants' statements in their conversations. As the court below noted, for the judge to have excised all of Durden's half of the discussions would have rendered the recorded conversations which were legitimate evidence, unintelligible (Ted Dean Butler Pet. App. A, p. 4).

[9] On February 6, 1970, federal agents arrested Leo Lovato. In the garage attached to the residence, they found 20,000 amphetamines in boxes in Lovato's car and in a footlocker (R.T. 1322-1325, 1352). They also found two ledger books in the foot locker and scraps of paper (R.T. 1323, 1330-1331). The location of these drugs had been pointed out to the officers by Leo Lovato.

ruled (Ted Dean Butler Pet. App. A, p. 7), petitioners lacked standing as persons aggrieved to object to the searches and seizures of the ledgers. *Alderman* v. *United States*, 394 U.S. 165. Moreover, the ledgers, which were found in Lovato's possession at the time of his arrest, contained accounting entries made during the course of the conspiracy. Since these entries were made in furtherance of the scheme, they were admissible against Lovato's co-conspirators. *United States* v. *Garelle*, 438 F. 2d 366, 369-370 (C.A. 2); *United States* v. *Bennett*, 409 F. 2d 888, 895, n. 6 (C.A. 2), certiorari denied, 396 U.S. 852, 402 U.S. 984.[10] Although the scraps of paper from Lovato's trash did not qualify under this rationale, nevertheless the court below correctly found that in view of other evidence in this case their admission was harmless (Ted Dean Butler Pet. App. A, p. 14). Moreover, petitioners do not explain how these papers may have prejudiced them.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys.

JUNE 1973.

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[10] The admission into evidence of such statements made in furtherance of a conspiracy by a non-testifying co-conspirator does not violate the right to confrontation. *Delaney* v. *United States*, 263 U.S. 586, 590; *United States* v. *Nall*, 437 F. 2d 1177 (C.A. 5); *United States* v. *McGann*, 431 F. 2d 1104 (C.A. 5), certiorari denied *sub nom. Pruitt* v. *United States*, 401 U.S. 919; cf. *Dutton* v. *Evans*, 400 U.S. 74.